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CHARTING THE INFLUENCES ON THE JUDICIAL MIND: AN EMPIRICAL STUDY OF JUDICIAL REASONING

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In 1988, hundreds of federal district judges were suddenly confronted with the need to render a decision on the constitutionality of the Sentencing Reform Act and the newly promulgated criminal Sentencing Guidelines. Never before has a question of such importance and involving such significant issues of constitutional law mandated the immediate and simultaneous attention of such a large segment of the federal trial bench. Accordingly, this event provides an archetypal model for exploring the influence of social background, ideology, judicial role and institution, and other factors on judicial decisionmaking. Based upon a unique set of written decisions involving an identical legal problem, the authors have produced an unprecedented empirical study of judicial reasoning in action. By exploiting this treasure trove of

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data, the authors have looked deeper into the judicial mind and observed the emergence of influences upon the manner in which a judge examined the constitutional issues, adopted a constitutional theory, and engaged in legal reasoning.

I. Introduction	1380
II. Prior Studies, the Present Study, and Their Value and Limitations.....	1385
A. Prior Empirical Research on Judicial Decisionmaking.....	1385
1. Studies of Social Background and Other Factors Influencing Judicial Decisionmaking	1385
2. The Problems of Incomparability, Inauthenticity, and Superficiality in Prior Studies	1392
B. The Sentencing Guidelines Crisis of 1988 as a Basis for the Study of Judicial Decisionmaking	1396
1. The Sentencing Guidelines Crisis of 1988.....	1396
2. The Sentencing Guidelines Cases Database.....	1407
3. The Value and Limitations of the Sentencing Guidelines Decisions for Empirical Study	1409
a. Resolving the Problem of Incomparability: The Identical Legal Problem	1409
b. Deepening the Search: Analyzing the Content of Judicial Reasoning in Opinions .	1410

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c. The Strength and Weakness of Using a Single Legal Problem	1412
d. Federal District Judges as a Subject of Study	1415
III. The Independent Variables	1417
A. Demographic Variables	1417
B. Political Variable.....	1419
C. Prior Employment Variables.....	1420
D. Judicial Role or Institution Variables	1421
E. Promotion Potential	1423
F. Precedent	1427
G. Summary of Independent Variables.....	1429
IV. The Dependent Variables—Outcome and Reasoning ...	1430
A. Analysis of Judicial Decisions—Outcome as Dependent Variable	1430
B. Analysis of Judicial Decisions—Reasoning Categories as Dependent Variables	1434
1. Method of Analyzing Opinions	1434
2. Methodology and Summary of Results	1438
a. Constitutional Claims Rulings	1438
i. Separation of Powers—Branch Location	1438
ii. Separation of Powers—Judge Members.	1441
iii. Non-Delegation Doctrine Rulings	1441
iv. Due Process Claim Rulings.....	1443
b. Reasoning Approach	1444
i. Practical Versus Theoretical Reasoning .	1444
ii. Originalist Versus Nonoriginalist Reasoning	1446
V. Findings and Interpretation	1451
A. Demographic Variables	1451
1. Sex	1451
2. Race	1454
3. Age.....	1459
4. Region.....	1460
5. Crime Rate	1461
6. Law School Education	1463
B. Political/Ideological Variables	1465
C. Prior Employment Variables	1470
1. Criminal Defense Lawyer.....	1470
2. Government/Political Positions.....	1473
a. Prosecutorial Experience	1473
b. Political Experience.....	1474

c. Executive, Legislative, and Judicial Positions	1475
3. State or Local Judge	1477
4. Military Service	1478
5. Law Professor	1479
D. Judicial Role or Institution Variables	1480
1. American Bar Association Rating	1480
2. Caseload/Workload	1483
3. Seniority on the Federal Bench	1486
E. Promotion Potential Factor	1487
F. Precedential Influences	1493
VI. Conclusion	1498

I INTRODUCTION

Either it is not the same or it is not real—lack of comparability among cases or the absence of authenticity are the *Scylla* and *Charybdis* of empirical study of judicial decisionmaking.¹ A study of judicial behavior based on a large sample of real decisions is inevitably weakened by incomparability caused by differences in parties, time period, issues, and facts. A study that escapes the pitfall of incomparability by presenting a hypothetical case to judges disconnects from concrete controversies with real consequences for real people, and relies on a nonrandom sample of volunteers.

To these alternative frailties of incomparability or inauthenticity may be added a third weakness, lack of depth in exploration of the steps in judicial reasoning toward resolution of a legal problem.² Longitudinal studies of multiple decisions focus upon aggregate “votes,” not the reasoning process of the judges in reaching those outcomes. Likewise, in a hypothetical experiment, persuading volunteer judges in substantial numbers not only to “decide” the case but also to devote substantial time and labor to drafting reasoned opinions is impracticable. Thus, researchers have been unable to probe thoroughly the process of judging and explore the contours of decisional analysis by fully engaged judicial actors.

Envisioning the ideal scenario for exploring social background, ideology, judicial role and institution, and other influences on a judge’s reasoning in decisionmaking, one would design a study asking every judge to render judgment on an identical case. The case would raise significant, complex, and controversial issues. Further, authen-

¹ See *infra* Part II.A.2.

² See *infra* Part II.A.2.

ticity demands that, while being fungible in substance between judges, the case could not be merely abstract in consequence. The ideal case would be an actual controversy that would not vary in content from the problem before every other judge in the study. Finally, to enhance the opportunity for evaluation of judicial decisionmaking, the study would demand a written opinion from each judge, giving the judge's reasons for the outcome. The researchers thus would be able to look beyond mere statements of outcome to peer closely into the "judicial mind"³ at work on a legal question of moment. Having stated this ideal, we might be accused of describing the impossible.⁴

Fortunately, although little known and less appreciated, such a natural laboratory, or something quite close to it, does exist.⁵ The equivalent of a single case was presented to hundreds of federal district court judges during the "Sentencing Guidelines Crisis of 1988," when the federal judiciary faced an unprecedented conflict in the administration of the criminal justice system. Pursuant to the Sentencing Reform Act,⁶ the newly created United States Sentencing Commission established mandatory sentencing "guidelines" based upon the offense and the characteristics of the crime and the offender.⁷ On November 1, 1987, the federal criminal Sentencing Guidelines took effect.⁸ As soon as the new regime was in place, the Sentencing Commission and the Sentencing Guidelines it had authored were challenged on multiple constitutional grounds by criminal defendants in the federal district courts.⁹

³ Cf. Glendon Schubert, *The Judicial Mind* (1965); Glendon Schubert, *The Judicial Mind Revisited* (1974). Schubert developed a psychometric model of Supreme Court decisionmaking under which the beliefs of the justices motivate their voting behavior. By contrast, we use the term "judicial mind" here more generically to describe the reasoning process by which a judge reaches a result.

⁴ See Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. Pol. 596, 603 (1985) (stating that obtaining responses by judges "to identical case stimuli . . . will never be the case in studies of trial court decision making"); see also Jon Gottschall, *Reagan's Appointments to the U.S. Courts of Appeals: The Continuation of a Judicial Revolution*, 70 *Judicature* 48, 51 (1986) (stating that "the problem of comparability of cases cannot be completely resolved at the lower federal court level"). As this study demonstrates, the prediction that this scenario "never" would arise proved to be too pessimistic, but "rarely" would be true, as our archetypal scenario appears to be unique and is unlikely to be often, if ever, replicated.

⁵ See *infra* Part II.B.2-3.

⁶ Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984), Pub. L. No. 98-473, 98 Stat. 1837, 1987-2034 (codified as amended in scattered sections of 18, 28 U.S.C.).

⁷ 28 U.S.C. § 994 (1994).

⁸ See United States Sentencing Commission, *Sentencing Guidelines and Policy Statements* (1987) [hereinafter *Sentencing Guidelines and Policy Statements*].

⁹ See *infra* Part II.B.1.

Accordingly, federal district judges across the nation were called upon to decide whether to apply the Guidelines when sentencing convicted criminal defendants or whether instead to strike down the Guidelines as contrary to constitutional principles. While awaiting final resolution of the constitutionality question, convicted criminal defendants were variously sentenced under divergent sentencing schemes depending on which federal district court or even which individual federal judge had jurisdiction over the sentencing proceeding. The result was chaos in the federal criminal justice system.¹⁰ The uncertainty did not dissipate until the Supreme Court ruled in January 1989 that the Sentencing Commission and its Guidelines passed constitutional muster.¹¹

During a period of less than a year, hundreds of judges rendered constitutional opinions on a single matter of great public importance. Never before has a question of such import and involving such significant issues of constitutional law mandated the simultaneous attention of such a large segment of the federal trial bench. Most importantly from the standpoint of empirical analysis, the legal attacks upon the Guidelines were independent of the facts in the individual defendants' cases and the common constitutional issues were open questions, with respected judges reaching opposing conclusions. Given the closely controverted nature of the legal questions, we would expect that sociological, ideological, or other factors would be most likely to play a role in judicial decisionmaking here, if they do anywhere. Thus, this situation provides an archetypal case for examining influences upon judicial behavior.

From a database consisting of the universe of district court Sentencing Guidelines constitutional decisions, involving a total of 293 judges, we constructed a standard set of independent variables (as well as alternatives) including each judge's demographic characteristics, party of appointing president, prior employment, and judicial role or institutional factors, as well as the factors of potential for promotion to the appellate court and precedential influence.¹² Most significantly, and to our knowledge without precedent in empirical research into judicial decisionmaking, we had the opportunity to study legal reasoning in action through opinions written or joined by 188 judges that resolved nearly identical legal questions.¹³

¹⁰ See *United States v. Ortega Lopez*, 684 F. Supp. 1506, 1520 & n.12 (C.D. Cal. 1988) (en banc) (Hupp, J., dissenting) (describing "chaos" caused by uncertainty in sentencing practice and procedure during this period).

¹¹ See *Mistretta v. United States*, 488 U.S. 361 (1989).

¹² See *infra* Part III.

¹³ See *infra* Part IV.B.

Toward that end, we created and implemented a strategy of categorizing and coding for statistical analysis the various veins of constitutional reasoning and theory found in this rich lode of decisional explanations. By mining this treasure trove of data, we have looked deeper into the judicial mind and observed the influences upon the manner in which a judge examines the constitutional issues, adopts a constitutional theory, and engages in legal reasoning.

For decades, scholars have referred to "the inescapable conclusion that judicial decisions—and particularly constitutional law decisions—are at least partially attributable to the personal values and experiences of the judges."¹⁴ By contrast, our general hypothesis was that extralegal factors have a modest influence and thus are poor predictors of judicial behavior. In sum, we were skeptical of legal "nihilism and its lesson that who decides is everything, and principle nothing but cosmetic."¹⁵

Our findings provide greater support to the behavioral model of judicial decisionmaking than we anticipated. While most of the social background variables we explored proved insignificant,¹⁶ some striking findings emerged that were consistent with a sociological or social construction model of decisionmaking, particularly with respect to the prior employment variable.¹⁷ For example, prior experience as a criminal defense lawyer was significant under several formulations of our dependent variables as an explanatory variable for opposition to the Sentencing Guidelines.¹⁸ On the other hand, prior experience as a state or local judge was related to upholding the Guidelines as constitutionally valid.¹⁹

In addition, a measure of a district judge's potential to be promoted to the court of appeals consistently correlated with approval of the constitutionality of the Guidelines,²⁰ confirming an earlier study involving a smaller set of decisions.²¹ Those judges most eligible for elevation appeared motivated to approve the Guidelines, which were the handiwork of the political branches with control over appoint-

¹⁴ Joel B. Grossman, *Social Backgrounds and Judicial Decision-Making*, 79 Harv. L. Rev. 1551, 1552 (1966). See generally *infra* Part II.A.1 (discussing mixed results of prior studies seeking to find connection between judges' social backgrounds and voting behaviors).

¹⁵ Paul D. Carrington, *Of Law and the River*, 34 J. Legal Educ. 222, 227 (1984).

¹⁶ See *infra* Part V.A.

¹⁷ See *infra* Part V.C.

¹⁸ See *infra* Part V.C.1.

¹⁹ See *infra* Part V.C.3.

²⁰ See *infra* Part V.E.

²¹ See Mark A. Cohen, *Explaining Judicial Behavior or What's "Unconstitutional" about the Sentencing Commission?*, 7 J.L. Econ. & Org. 183, 184 (1991) (conducting study of Sentencing Guidelines constitutionality decisions by 196 judges).

ments to higher courts. Together with evidence that judges were influenced by the perceived impact of the ruling on future workload, our finding provides empirical support for an economic model of judicial decisionmakers. Yet the evidence was ambiguous, suggesting a more complicated interaction. When we explored whether promotion potential motivated judges, particularly those appointed by Republican presidents, to adopt the preferred constitutional theory of the Reagan-Bush administrations, the significance of the promotion potential factor faded away.

When we moved beyond analysis of the outcomes (constitutional versus unconstitutional) to the reasoning reflected in written opinions, other influences emerged that had been obscured in the general result stage of the analysis. For example, while minority race judges did not rule differently on the overall question of constitutionality, race correlated with the theory upon which that outcome was premised. Minority judges were significantly more likely to accept the novel concept of a due process right to individualized sentencing, rather than grounding a decision on the conventional separation of powers theories more frequently articulated by nonminority judges.²² Other results were also fascinating, such as the startling finding that use of originalist constitutional reasoning correlated *negatively* with appointment by President Reagan.²³ In sum, our study demonstrates that prior empirical studies of judicial decisionmaking, which focused upon outcomes and generally neglected reasoning as reflected in opinions, have overlooked the heart and soul of the judicial process.

Finally, our study confirmed that *legal*, as well as *extralegal*, variables are important and cannot be neglected. Contrary to a strict behavioral model, the prior rulings of their colleagues powerfully influenced judges in reaching a decision.

²² See *infra* Part V.A.2.

²³ See *infra* Part V.B.

II

PRIOR STUDIES, THE PRESENT STUDY, AND THEIR VALUE
AND LIMITATIONSA. *Prior Empirical Research on Judicial Decisionmaking*1. *Studies of Social Background and Other Factors Influencing Judicial Decisionmaking*²⁴

Norman Dorsen aptly capsulizes the behavioral or social background model, which has dominated social science research into judicial decisionmaking:

We must never forget that the boy is father to the man, that the seeds of the fully mature person are long embedded in his character. One need not embrace Freudian psychology to conclude that early experience and training will be reflected in later actions and decisions, and that flexibility and open-mindedness are themselves the product of what has gone before.²⁵

The theory states that social background or personal attributes of judges shape personal and policy values that directly influence judicial decisions.²⁶

However, empirical analyses of behavioral theory have been largely disappointing, leading many researchers to question whether the theory remains viable.²⁷ Indeed, "mixed results" is the phrase re-

²⁴ Specific results of prior studies are further developed in Part V of this article, which discusses and interprets the results of this study by sets of independent variables.

²⁵ Norman Dorsen, *A Change in Judicial Philosophy?*, *Nat'l L.J.*, Feb. 18, 1985, at 13; see also S. Sidney Ulmer, *Are Social Background Models Time-Bound?*, 80 *Am. Pol. Sci. Rev.* 957, 957 (1986) (calling Dorsen's comment "about as concise a statement of the social background theory as could be penned").

²⁶ See C. Neal Tate & Roger Handberg, *Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916-88*, 35 *Am. J. Pol. Sci.* 460, 460-61 & n.2 (1991); see also Henry R. Glick, *Courts, Politics, and Justice* 313 (3d ed. 1993) ("The study of judges' personal backgrounds assumes basically that people behave according to who they are."). An alternative approach examines courts as the unit of analysis and seeks to determine the influence of aggregate measures of a jurisdiction's characteristics (e.g., method of judicial selection) on evolution of doctrine. See, e.g., Bradley C. Canon & Lawrence Baum, *Patterns of Adoption of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines*, 75 *Am. Pol. Sci. Rev.* 975, 975 (1981) (studying whether judicial doctrines diffuse on regional basis, and whether organizations adopt innovations consistently across issues, based on underlying characteristics of organization); Andrew P. Morriss, *Developing a Framework for Empirical Research on the Common Law: General Principles and Case Studies of the Decline of Employment-at-Will*, 45 *Case W. Res. L. Rev.* 999, 1020-56 (1995) (studying content of judicial opinions in context of evolution of common law doctrine).

²⁷ See Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* 231-34 (1993) (concluding that empirical evidence provides little support for relationship between social background factors and judicial attitudes); Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 *J. Legal Stud.* 257, 281 (1995) (concluding, in context of

searchers most commonly select to describe prior attempts to connect social or experiential attributes of judges to their voting behavior.²⁸ For example, race and sex generally have appeared to have little explanatory value for judicial decisionmaking.²⁹ Similarly, prior judicial

federal district court outcomes in civil rights cases, "that individual judge characteristics cannot be assumed to influence substantially the mass of cases"); Gerard S. Grysik & Eleanor C. Main, Social Backgrounds as Predictors of Votes on State Courts of Last Resort: The Case of Sex Discrimination, 39 W. Pol. Q. 528, 528-29, 536 (1986) (describing criticism of social background theory but concluding that theory remains viable with significant limitations); see also Peter J. Van Koppen & Jan Ten Kate, Individual Differences in Judicial Behavior: Personal Characteristics and Private Law Decision-Making, 18 L. & Soc'y Rev. 225, 225-41 (1984) (finding that Dutch judicial decisions in civil cases are only moderately influenced by personality characteristics of judges, measured by psychological tests through questionnaire to judges participating in simulation).

²⁸ See Sue Davis, Susan Haire & Donald R. Songer, Voting Behavior and Gender on the U.S. Courts of Appeals, 77 *Judicature* 129, 130 (1993) (describing prior empirical research on behavior of women decisionmakers, including judges, as producing "mixed results"); Sheldon Goldman, Voting Behavior on the U.S. Courts of Appeals Revisited, 69 Am. Pol. Sci. Rev. 491, 496 (1975) (describing multitude of prior studies on relationship of background variables to judicial voting behavior as having "mixed" results); John Gruhl, Cassia Spohn & Susan Welch, Women as Policymakers: The Case of Trial Judges, 25 Am. J. Pol. Sci. 308, 311 (1981) (describing studies using judges' sex as independent variable as yielding "mixed results"); Tate & Handberg, *supra* note 26, at 470 (describing results of prior studies on influence of prior judicial experience as "mixed"); Ulmer, *supra* note 25, at 957 (describing prior research on social background influences upon judicial decisionmaking as producing "mixed results").

²⁹ See, e.g., Davis, Haire & Songer, *supra* note 28, at 131-32 (finding no significant differences between male and female judges in search and seizure and obscenity cases, when controlling for party of appointing president, although finding female judges more liberal in employment discrimination cases); Jon Gottschall, Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals, 67 *Judicature* 164, 171-73 (1983) (finding relative similarity between President Carter's male and female appointees to courts of appeals and, with exception of criminal cases, minimal variances between black and white judges, even in racial discrimination cases); Gruhl, Spohn & Welch, *supra* note 28, at 318-20 (finding few significant differences in conviction rates of male and female judges, although finding female judges more likely to sentence female defendants to prison); Herbert M. Kritzer & Thomas M. Uhlman, Sisterhood in the Courtroom: Sex of Judge and Defendant in Criminal Case Disposition, Soc. Sci. J., April 1977, at 77, 86 (concluding that female judges "behave no differently than their male colleagues" in study of sentencing); Cassia Spohn, The Sentencing Decisions of Black and White Judges: Expected and Unexpected Similarities, 24 L. & Soc'y Rev. 1197, 1211-14 (1990) (finding "remarkable" similarities in sentencing decisions of black and white judges and concluding that race of judge has little predictive power); Thomas M. Uhlman, Black Elite Decision Making: The Case of Trial Judges, 22 Am. J. Pol. Sci. 884, 891-94 (1978) (finding no important differences between black and white judges in criminal conviction rates and sentencing); Walker & Barrow, *supra* note 4, at 613-15 (finding marked similarity in decisionmaking records between black and white federal district judges in several fields and few differences between male and female judges, with exception of tendency of female judges to rule in favor of government entities); Susan Welch, Michael Combs & John Gruhl, Do Black Judges Make a Difference?, 32 Am. J. Pol. Sci. 126, 131-35 (1988) (finding little impact of black judges in overall severity of criminal sentencing, but finding evidence of more equal treatment by black judges of white and black defendants in decisions to incarcerate); Richard L. Fox & Robert W. Van Sickel,

experience has seldom been found significant³⁰ and, even on those occasions where it has correlated with judicial behavior, has remained a weak influence.³¹ While some studies have found prior criminal prosecution experience to be influential, the influence has pointed in somewhat inconsistent directions.³² Don Bowen's pronouncement thirty years ago still holds force today: "A final inescapable conclusion about the explanatory power of the sociological background characteristics of [judges] is that they are generally not very helpful."³³

Still, behavioral theory has enjoyed at least occasional success. Certain studies have produced intriguing results in discrete contexts that cannot be dismissed. For example, one study found that female judges were more deferential than their male counterparts to positions taken by the government in personal rights and economic regulations

Gender Dynamics and Judicial Behavior in Criminal Trial Courts 12-13, 20-22 (1998) (unpublished manuscript on file with the *New York University Law Review*) (finding no clear pattern of male and female traits or "voice" in exercise of judicial discretion by local criminal judges, although finding some gender differences, such as that female judges were more likely to rely on prosecution while male judges were more likely to side with defense); Kenneth Luis Manning, *Como Decide? (How Do You Decide?): Decision-Making by Hispanic Judges in the Federal District Courts* 6 (1998) (unpublished manuscript on file with the *New York University Law Review*) (finding that "the difference in ideology of Hispanic and Non-Hispanic judge decisions [on federal district courts] is virtually nonexistent").

³⁰ See J. Woodford Howard, Jr., *Courts of Appeals in the Federal Judicial System* 182-83 (1981) (finding in study of circuit judges' votes across multiple fields that prior judicial experience was significant only on discrete issue of civil rights); Ashenfelter, Eisenberg & Schwab, *supra* note 27, at 277-81 (finding that individual judge characteristics, including prior judgeship, did not appear to influence substantially mass of cases decided by district court judges); Gryski & Main, *supra* note 27, at 532 (finding that prior career characteristics of judges were "not useful predictors of state high court judicial behavior in sex discrimination cases").

³¹ See Tate & Handberg, *supra* note 26, at 470 (describing finding in C. Neal Tate, *Personal Attribute Models of the Voting Behavior of United States Supreme Court Justices*, 75 Am. Pol. Sci. Rev. 355, 361-63 (1981)).

³² For example, prosecutorial experience has been associated with a more conservative behavior in civil liberties cases, see *id.* at 474-76, but with a more liberal or favorable response to racial equal protection claims, see Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 Cornell L. Rev. 1151, 1190 (1991); see also Stuart S. Nagel, *Judicial Backgrounds and Criminal Cases*, 53 J. Crim. L. & Criminology 333, 336 (1962) (finding in early study that former prosecutors were significantly more likely to vote against defense in criminal cases).

³³ Don Bowen, *The Explanation of Judicial Voting Behavior from Sociological Characteristics of Judges* (1965) (unpublished Ph.D. dissertation, Yale University) (on file with author), quoted in S. Sidney Ulmer, *Social Background as an Indicator to the Votes of Supreme Court Justices in Criminal Cases: 1947-1956 Terms*, 17 Am. J. Pol. Sci. 622, 622 (1973); see also Howard, *supra* note 30, at 182 (finding, in study of decisions by circuit judges in multiple fields, that "[n]o single background characteristic was a strong determinant of voting outcomes across the board"); Gryski & Main, *supra* note 27, at 528 (acknowledging that "social background factors have not proven to be particularly effective means by which to explain judicial behavior").

cases,³⁴ and another found that female judges were more supportive of claimants in employment discrimination cases.³⁵ Another study found a pronounced variance in voting by black and white federal appellate judges in criminal cases,³⁶ although several studies found little or no difference in adjudication of criminal cases by black and white judges.³⁷ Although findings of significant association between basic background variables and judicial behavior have been fairly isolated and rarely replicated in other contexts, they do exist.

In contrast to the sporadic findings of significant correlation on other background variables, studies frequently (but not invariably³⁸) have found political party identification to be a significant predictor of judicial voting in ideologically divisive cases.³⁹ Affiliation with the Democratic party corresponds to more liberal patterns of voting behavior by judges,⁴⁰ as does appointment to the federal bench by a Democratic president.⁴¹ However, the influence of even this variable

³⁴ See Walker & Barrow, *supra* note 4, at 604-11.

³⁵ See Davis, Haire & Songer, *supra* note 28, at 131-32. But see Gryska & Main, *supra* note 27, at 531-32, 536 (finding sex not to be significant influence in study of state high court judges in sex discrimination cases, although number of female judges was too small for reliable conclusions).

³⁶ See Gottschall, *supra* note 29, at 172-73.

³⁷ See Walker & Barrow, *supra* note 4, at 613-15 (finding that "black and white [federal district] judges displayed markedly similar decision-making records" in multiple legal fields, including criminal law and procedure). Studies of trial judges have consistently found little or no difference between black and white judges in adjudication of criminal cases, including conviction rates and sentencing severity. See, e.g., Spohn, *supra* note 29, at 1211-14; Uhlman, *supra* note 29, at 891-94; Welch, Combs & Gruhl, *supra* note 29, at 131-35.

³⁸ See Howard, *supra* note 30, at 182-83, 186 (finding, in study of circuit judge decisions across multiple fields, that party identification was weakest indicator on votes, and concluding that "[t]he predictive power of political indicators was negligible and indirect"); Ashenfelter, Eisenberg & Schwab, *supra* note 27, at 281 (concluding in study of district court decisions "that we cannot find that Republican judges differ from Democratic judges in their treatment of civil rights cases").

³⁹ See, e.g., C. K. Rowland & Robert A. Carp, *Politics and Judgment in Federal District Courts* 24-57 (1996); Jilda M. Aliotta, *Combining Judges' Attributes and Case Characteristics: An Alternative Approach to Explaining Supreme Court Decisionmaking*, 71 *Judicature* 277, 278, 280 (1988); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 *Yale L.J.* 2155, 2175-76 (1998); Goldman, *supra* note 28, at 496-506; Gottschall, *supra* note 29, at 169-71; Gottschall, *supra* note 4, at 51-54; Gryska & Main, *supra* note 27, at 531, 533-34; Stuart S. Nagel, *Political Party Affiliation and Judges' Decisions*, 55 *Am. Pol. Sci. Rev.* 843, 845 (1961); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 *Va. L. Rev.* 1717, 1717-21, 1738-66 (1997). See generally *American Court Systems* 382 (Sheldon Goldman & Austin Sarat eds., 2d ed. 1989).

⁴⁰ See Rowland & Carp, *supra* note 39, at 24 (noting that "Democratic judges are 1.42 times more likely to render a liberal decision than are judges of Republican backgrounds"); Gryska & Main, *supra* note 27, at 534.

⁴¹ See Rowland & Carp, *supra* note 39, at 46 (finding that judicial "appointees of Democratic presidents are clearly more liberal" in decisionmaking than judges chosen by

should not be overstated; the most comprehensive study of federal district court judges to date found relatively little overall difference between Democratic- and Republican-affiliated judges.⁴² Moreover, at least as of 1986, partisan-correlated behavior by federal judges was declining.⁴³

In addition, the focus of prior studies on outcomes over lengthy periods of time in published opinions may have skewed the results toward greater partisan influence: “[W]hen attention shifts from aggregate patterns of case outcomes to individual, case-specific decisions, the effects of political influences are less apparent.”⁴⁴ Thus,

Republicans); Gottschall, *supra* note 29, at 169-71; Gottschall, *supra* note 4, at 51. For a discussion of the relationship between a judge's party identification and the party of the appointing president, see *infra* Part III.B.

⁴² See Rowland & Carp, *supra* note 39, at 34 (finding difference of 10-13% between Democratic and Republican cases for all types of cases). However, there were significantly higher partisan voting differences in certain areas, such as race discrimination and religion. See *id.* at 40 (finding difference between Democratic and Republican judges of 28% on race discrimination cases and 24% on religion cases); *id.* at 48-50 (finding some dramatic voting differences between Carter and Reagan appointed judges on such issues as race (60%) and right to privacy (33%)); see also Gottschall, *supra* note 4, at 53 (finding, in study of court of appeals judges, that when looking at results in universe of both unanimous and nonunanimous cases, margin of difference between appointees of Democratic and Republican presidents was 20% in civil rights and liberties cases and 10% in economic cases).

⁴³ See Rowland & Carp, *supra* note 39, at 56. At least two studies of judicial behavior post-1986 have confirmed the decline of partisan variance among federal judges. See Nancy Scherer, *Reexamining the Politics of Crime in the Federal Courts: Are Bill Clinton's Judicial Appointees "New" Democrats or "Old" Democrats?* 29 (1998) (unpublished manuscript, on file with the *New York University Law Review*) (concluding that “partisan affiliation is no longer sufficient to distinguish between the voting behavior of federal appeals court judges, at least with respect to issues of criminal law and civil liberties,” and finding in study of search and seizure cases that voting behavior of Clinton’s judicial nominees to federal appellate courts is “virtually indistinguishable” from that of appointees of his Republican predecessor); see also Ronald Stidham, Robert A. Carp & Donald R. Songer, *The Voting Behavior of President Clinton's Judicial Appointees*, 80 *Judicature* 16, 19-20 (1996) (concluding that Clinton’s appointees have demonstrated moderate decisional tendencies, and finding small differences in “liberal” voting rates, generally under 10% across categories of cases, for both district and court of appeals judges).

However, another recent study found significant partisan voting on the multimember appellate panels of the District of Columbia Circuit. See Revesz, *supra* note 39, at 1717-19. Revesz concluded that “judges generally vote consistently with their ideological preferences only when they sit with at least one other judge of the same political party” and therefore prior studies that “fail[ed] to control for such panel composition effects” have “substantial[ly] underestimat[ed] the frequency of ideological voting.” *Id.* at 1719-20. However, Revesz acknowledged that “judges on the D.C. Circuit have a far higher political profile than do federal judges generally” and “[t]hus ideology might have a greater-than-average impact on the votes of these judges than on the universe of federal circuit court judges.” *Id.* at 1720-21.

⁴⁴ Rowland & Carp, *supra* note 39, at 14.

when lack of comparability is reduced by adhering to a case-specific scenario, political affiliation as a predictor declines.⁴⁵

In any event, political affiliation is different in kind from other socioeconomic background factors because it involves a deliberate adoption of values or attitudes.⁴⁶ As Jeffrey Segal and Harold Spaeth explain:

[T]wo of the most important variables—partisanship and appointing president—are probably best considered surrogates for judicial attitudes, not causes of them—and, as such, are at least potentially independent of social background. Thus they are useful for predicting attitudes, but are of less help in explaining them. For instance, President Reagan nominated Antonin Scalia [to the United States Supreme Court] because Scalia is a staunch conservative; Scalia is not a staunch conservative because he was nominated by Reagan. Similarly, among political elites, ideology might influence party identification at least as much as party identification influences ideology.⁴⁷

The limited success of behavioral research underscores the need to develop a more sophisticated and comprehensive model. In addition, the behavioral model places undue emphasis upon extralegal factors, neglecting the mediating effect of judicial role orientation

⁴⁵ This is especially true when most such studies rely on published opinions which, particularly at the federal district court level, are an unrepresentative sample of peculiarly controversial cases. See *id.* at 16 (noting that less than five percent of district court decisions are published and that “published decisions tend to be policy judgments with greater political consequences than their unpublished counterparts”). See generally Susan M. Olson, *Studying Federal District Courts Through Published Cases: A Research Note*, 15 *Just. Sys. J.* 782 (1992) (arguing that published decisions are not representative of all district court cases). When unpublished decisions are examined, partisan differences fade considerably, although this may be at least partially attributable to the routine, precedent-bound nature of such cases that leaves less room for expression by judges of political proclivities. See Rowland & Carp, *supra* note 39, at 134 (finding that while link between political appointment and judicial rulings may extend to certain types of unpublished decisions, “the magnitude and consistency of appointment effects on unpublished opinions do not compare with appointment effects on published decisions”); Ashenfelter, Eisenberg & Schwab, *supra* note 27, at 258-60, 281 (finding no partisan difference in district court rulings in day-to-day docket). But see Rowland & Carp, *supra* note 39, at 21 (reporting other studies finding that differences in partisan voting by district judges between published and unpublished opinions were negligible); see also Morris, *supra* note 26, at 1038-47 (summarizing literature on unpublished decisions and their role in empirical work).

⁴⁶ See Ulmer, *supra* note 25, at 961 (stating that, unlike other experiential variables, party choice is “a surrogate for the aggregate of attitudes” that other experiences produce); see also American Court Systems, *supra* note 39, at 382 (stating that party affiliation and appointment by particular president are “likely reasonably accurate surrogates for attitudes and values”).

⁴⁷ Segal & Spaeth, *supra* note 27, at 232; see also Ulmer, *supra* note 25, at 961 (stating that “[i]t may not be strictly logical . . . to argue that party ‘causes’ or influences judicial votes” because party choice is “a surrogate for the aggregate of attitudes” possessed by judge).

(impartiality, suppression of personal predilections, attention to legal doctrine) and precedent.⁴⁸ There is a growing recognition that social background or behavioral theory, even including partisan or political linkage, is an insufficiently robust model for explaining judicial decisionmaking. C. K. Rowland and Robert Carp, who have conducted the most comprehensive empirical study of federal district judges, have recently called for a new approach that "accommodate[s] political and jurisprudential influences without assuming away the judicial reasoning process."⁴⁹ While not retreating to a formalistic legal model, researchers need to take more seriously both the legal dimension and the judge's role orientation as judicial officer.⁵⁰ Moreover, it is time for a revival of interest in the actual judgment process, as reflected in judges' explanations of their reasoning.

Another reason to focus effort on developing a model that incorporates additional factors is provided by public choice or rational action theory. Thus far, public choice theory has had relatively little to say about judges' behavior in deciding cases, in large measure because

[t]he structure of the 'independent' judiciary is designed to remove judges from the day-to-day pressures and temptations of ordinary political office, and with some qualifications it achieves that end. It is a strategy that recognizes the forces of self-interest, regards them

⁴⁸ See Howard, *supra* note 30, at xxiii (stating that "judicial roles become intervening variables between institutional and personality factors in the judicial process"); Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 Nw. U. L. Rev. 251, 299 (1997) ("The judicial process is meant to create a role orientation centering decisions on the legal model. While research into judicial role orientation is somewhat limited, there is reason to think that role responsibilities play an important part in judging.").

⁴⁹ Rowland & Carp, *supra* note 39, at 136. They observe that, at least in terms of self-perception, "many trial judges appear to be motivated primarily by their role orientation—that is, their 'secondary' perceptions of what a judge should do—and not by their personal preferences." *Id.* at 190. "A role orientation is a psychological construct which is the combination of the occupant's perception of the role expectations of significant others and his or her own norms and expectations of proper behavior for a judge." James L. Gibson, *Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model*, 72 Am. Pol. Sci. Rev. 911, 917 (1978). Gibson found that a judge's role orientation acts as an intervening variable, such that a judge's belief about the legitimacy of allowing nonlegal criteria to influence decisions does indeed affect "the relationship between attitudes and behavior." *Id.* at 922; see also *American Court Systems*, *supra* note 39, at 437 (explaining that "the judge's concept of role can inhibit the full flowering of political attitudes and values" in exercise of judicial discretion).

⁵⁰ See Rowland & Carp, *supra* note 39, at 150-73 (proposing new model of trial court judgment as special case of "social judgment" within context of legal system that, while allowing discretion, also places meaningful constraints on judges' decisionmaking authority).

as potentially destructive, and then takes *successful* institutional steps to counteract certain known and obvious risks.⁵¹

Consequently, while public choice theory suggests examining legislators' votes and campaign contributions from special interest groups, similar candidates for empirical research of judicial behavior are not immediately obvious. Although public choice's predictive power with respect to judicial decisions is limited (a view that is widely shared in the literature⁵²), it does suggest certain factors are likely to be important. Because the institutional structure of the judiciary restricts pecuniary gain, "ambitious judges could seek to maximize their 'influence' and 'prestige,' which are normally achieved by excellence in argument and writing."⁵³ Although secure in their present positions, federal judges may also seek career advancement within the judiciary.

Public choice theory thus suggests that empirical research into judicial decisionmaking needs to take into account not only sociological background variables, but also the legal context and reasoning of the opinions through which judges express their views. Further, the institutional structure, which provides judges with their independence from the influence of more usual public choice factors, also "frees them to develop whatever theories of statutory construction and constitutional interpretation, wise or foolish, deferential or mischievous, that captures their fancy."⁵⁴ It thus creates the space in which the variation necessary for empirical analysis can arise.

2. *The Problems of Incomparability, Inauthenticity, and Superficiality in Prior Studies*

By necessity, most empirical studies of judicial behavior have examined sample groups of judges and series of unrelated cases in general areas of the law. For example, researchers have grouped federal judges by appointing president or party of appointing president, com-

⁵¹ Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. Rev. 827, 831-32.

⁵² See, e.g., Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 Sup. Ct. Econ. Rev. 1, 2 (1993) [hereinafter Posner, *What Do Judges Maximize*] ("The economic analyst has a model of how criminals and contract parties, injurers and accident victims, parents and spouses—even legislators, and executive officials such as prosecutors—act, but falters when asked to produce a model of how judges act."); Edward L. Rubin, *The New Legal Process, The Synthesis of Discourse, and the Microanalysis of Institutions*, 109 Harv. L. Rev. 1393, 1399 (1996) ("[N]o stable [public choice] theory has emerged to explain the behavior of judges because most American judges, regardless of their substantive decisions, are insulated from monetary rewards or punishments, guaranteed of their position[s], and unable to affect their own jurisdiction in any direct fashion.").

⁵³ Epstein, *supra* note 51, at 838.

⁵⁴ *Id.* at 851.

paring the voting records of different groups across a large sample of different cases, often by labeling the outcome as "liberal" or "conservative."⁵⁵ Other studies have examined background variable influences upon judicial behavior by looking at the propensity of judges to vote for plaintiffs in civil rights cases, or for defendants in criminal cases.⁵⁶ These longitudinal studies have the value of examining judicial behavior over a period of time and in the context of a large number of cases. However, such studies also share the assumption that different cases over a period of years are sufficiently similar that the results are comparable.⁵⁷ A study of votes by judges for defendants in criminal cases, for example, can lead to meaningful results only if we assume that as a category criminal cases are sufficiently similar in nature that the frequency of a judge's vote for a defendant

⁵⁵ See, e.g., Howard, *supra* note 30, at xix, 173-84 (reviewing 4,941 decisions by 35 judges of Second, Fifth, and District of Columbia Circuits, from fiscal years 1965-1967, in such categories as civil rights, criminal, and labor, with certain outcomes labeled liberal or conservative); Rowland & Carp, *supra* note 39, at 18 (reviewing 45,826 published opinions issued by 1500 district court judges from 1933-1987, categorized into 26 case types with liberal/conservative dimension); Gottschall, *supra* note 29, at 167-68 (reviewing all court of appeals decisions in criminal procedure, racial discrimination, and sex discrimination cases over two-year period, labeling votes in favor of claims by criminally accused and discrimination claimants as liberal); Gottschall, *supra* note 4, at 51 (reviewing all court of appeals decisions in multiple general fields, including racial or sexual discrimination and criminal procedure, during year-and-a-half period, with certain outcomes assigned liberal label).

⁵⁶ See, e.g., Davis, Haire & Songer, *supra* note 28, at 130-31 (reviewing votes of all federal court of appeals judges from 1981-1990 in employment discrimination, criminal procedure, and obscenity cases); Goldman, *supra* note 28, at 492 (reviewing decisions by court of appeals judges in multiple issue areas, including criminal procedure, civil liberties, labor, and government fiscal); Gryski & Main, *supra* note 27, at 529, 536 (reviewing state high court rulings in sex discrimination cases from 1971-1981); Nagel, *supra* note 32, at 333 (reviewing criminal cases decisions from 1955 involving 313 state and federal supreme court judges listed in directory).

⁵⁷ See Van Koppen & Ten Kate, *supra* note 27, at 226 ("The problem in working with actual decisions is to ensure that the different cases heard by different judges are comparable on all relevant dimensions."). See generally John M. Conley & William M. O'Barr, *Fundamentals of Jurisprudence: An Ethnography of Judicial Decision Making in Informal Courts*, 66 N.C. L. Rev. 467, 472-73 (1988) (discussing alternative problems of incomparability among cases or unrealistic simulation in empirical research of judicial decisionmaking). Conley and O'Barr also criticize prior quantitative studies as inadequate to "answer the question of what caused the result in a particular case," *id.* at 473, and adduce the limitations of a priori judgments by researchers in selecting the variables to be evaluated in a study, *see id.* at 474-75. They propose an alternative method of observing judges as they make decisions and then evaluating judicial statements of reasoning in a group workshop discussion applying conversational analysis. See *id.* at 475-79. However, the Conley-O'Barr method cultivates its own weaknesses, such as the absence of quantification, the difficulty in replication by other researchers, and heavy dependence on the subjective interpretations of the workshop participants. In any event, we have adhered to a traditional quantitative statistical model, which requires developing (through review of the raw data, prior research, and theory) independent variables for coding and analysis.

reflects a general judicial attitude rather than individualized resolution of the unique facts in each particular case.⁵⁸

Simulation experiments with judges exhibit the other primary weakness of prior studies, an inauthenticity that fails to mirror the real world of adjudication and judicial decisionmaking. As John M. Conley and William M. O'Barr comment: “[E]xperiments involve simulation. One can never claim with certainty to have captured all the elements of a real case, nor can one be sure that subjects will respond to stimuli in the same way as they would in the courtroom.”⁵⁹ For example, Peter Van Koppen and Jen Ten Kate conducted a simulation of the judicial decisionmaking task by submitting nine written case problems to Dutch judges, along with questionnaires on role con-

⁵⁸ See Aliotta, *supra* note 39, at 277 (observing that “[b]oth studies of judicial attributes and judicial attitudes are concerned with judges’ voting propensities over a large number of cases,” such that “the facts or legal principles involved in particular cases are not considered relevant”); Gottschall, *supra* note 29, at 169 n.13 (observing that “lower federal court judges decide different cases in different settings and their votes are not directly comparable” and thus “generalizations from such quantitative data” about relative attitudes of lower court judges “must be assessed cautiously”). Even when the study focuses upon United States Supreme Court decisions, thereby including generally the same set of judges hearing the same cases, see, e.g., Segal & Spaeth, *supra* note 27; Tate & Handberg, *supra* note 26; Ulmer, *supra* note 33, the incomparability problem persists through the assumption that a justice’s resolution of one discrete case in a field, such as criminal law, provides evidence of an attitude on that subject rather than evaluation of anomalous facts, circumstances, or legal doctrinal implications of that individual case. Moreover, because the number of justices included in a study of the Supreme Court is limited, such studies may produce poignantly detailed descriptions of the attributes, experiences, attitudes, philosophies, and predilections of a small, atypical collection of individual human beings, but add little knowledge about the general subject of judicial decisionmaking. In other words, detailed studies of Supreme Court justices may come dangerously close to biography rather than sociology.

Some researchers have attempted to compensate for the incomparability of aggregate votes in different cases by incorporating certain fact-pattern or other case-specific characteristics to the analysis. See, e.g., Segal & Spaeth, *supra* note 27, at 216-21, 229-31 (in study of Supreme Court rulings in search and seizure cases, combining derived attitude values for justices and twelve fact-based factors, such as justification for search, place of intrusion, etc., as independent variables, resulting in greater prediction rate, although concluding that justices’ attitudes are more important than facts of case in predicting votes); Aliotta, *supra* note 39, at 279-80 (devising case characteristic variables for equal protection cases, such as whether case involved race, fundamental rights, or education, or was brought as class action). While this approach is an important refinement of prior research techniques, the case characteristics chosen remain those the researcher deems important (based in part on prior research or content analysis of opinions) and cannot fully account for the multidimensional aspects of each individual case. Moreover, even while incorporating case characteristics into the analysis, these studies continue to focus upon general outcome votes, for example, in favor of or against a civil rights or an equal protection claim as the dependent variable. See, e.g., Segal & Spaeth, *supra* note 27, at 242-55; Aliotta, *supra* note 39, at 278. The divergent paths that would lead to the same result, that is, the judges’ reasoning, are not explored.

⁵⁹ Conley & O'Barr, *supra* note 57, at 474-75.

ceptions and personality.⁶⁰ They acknowledged the limitations of their research design: "Our simulation was . . . unlike actual cases in the brevity of the written materials [one-page summaries of facts] and in the fact that our judges, like judges in self-report studies, knew that the fate of actual litigants did not depend on their decisions."⁶¹ In addition, the facts as provided in the hypothetical problems were undisputed, whereas "the factual situations of actual cases [are] more complex and ambiguous."⁶²

Moreover, in both longitudinal and simulation studies, researchers are less able to explore the reasoning process. In longitudinal studies, researchers typically measure general outcomes in broadly defined types of cases,⁶³ leaving the process of judicial analysis in the individual case unexamined. In an experimental study, in addition to the unreality of the situation and the need to rely upon unrepresentative volunteers, the participating judges are unlikely to devote the substantial time, deliberation, and exposure to critique attendant to preparation of a full-scale written opinion explaining resolution of a legal problem.⁶⁴ In either situation, as Rowland and Carp note, past empirical studies have "focus[ed] attention exclusively on aggregate 'vote' outcomes rather than on the individual judgment processes that engendered those outcomes."⁶⁵

Accordingly, prior longitudinal studies are well-complemented by a case study involving presentation of a single, identical legal problem to a large number of judges, with an examination of the results in light of background and other independent variables. Likewise, while experimental simulations and other self-reporting surveys of judicial actors substantially add to our knowledge, a confirmation test of decisionmaking behavior must take place in the context of a real case, demanding meaningful judicial attention to a genuine controversy. Ideally, this model and authentic controversy scenario would also include judicial presentation of reasons for the decisions, in the form of written opinions, which would provide richer data for analysis and

⁶⁰ See Van Koppen & Ten Kate, *supra* note 27, at 225. Van Koppen and Ten Kate explain that Dutch civil cases generally do proceed with exchange of written documents, such that presentation of written protocols was a legitimate simulation of the tasks that face trial judges in that nation. See *id.* at 227.

⁶¹ *Id.* at 227.

⁶² *Id.* at 240.

⁶³ See Goldman, *supra* note 28, at 491 (explaining that outcomes in general issue areas were examined in "basic political terms of who wins and who loses and by implication what political values are seemingly being fostered").

⁶⁴ See Van Koppen & Ten Kate, *supra* note 27, at 227 (explaining that study asked participating judges "for their decisions but did not ask them to follow the common procedure in actual cases of providing justifications for the decisions reached").

⁶⁵ Rowland & Carp, *supra* note 39, at 149.

may reveal influences that have been submerged at the general outcome level.

Fortunately, the Sentencing Guidelines Crisis offers an unprecedented opportunity to conduct such an in-depth study in the context of a uniquely fertile database. The history and litigation background leading to this set of decisions, the nature of the database, and the value and limitations of this episode in legal history for an empirical study are described next.

B. The Sentencing Guidelines Crisis of 1988 as a Basis for the Study of Judicial Decisionmaking

1. The Sentencing Guidelines Crisis of 1988

The Sentencing Reform Act of 1984⁶⁶ established the United States Sentencing Commission as “an independent commission in the judicial branch of the United States.”⁶⁷ The Commission is a permanent body with seven voting members, at least three of whom must be federal judges chosen from a group of six recommended by the Judicial Conference of the United States.⁶⁸ The members of the Commission are chosen by the president with the consent of the Senate and serve six-year terms.⁶⁹ They are removable from the Commission by the president for good cause.⁷⁰

The Commission is charged with the task of developing determinate “guidelines . . . for use of a sentencing court in determining the sentence to be imposed in a criminal case.”⁷¹ Pursuant to its statutory

⁶⁶ The Sentencing Reform Act of 1984 was enacted as Chapter II of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1987-2034 (codified as amended in scattered sections of 18, 28 U.S.C.).

⁶⁷ 28 U.S.C. § 991(a) (1994).

⁶⁸ See id. The judicial members of the Commission are not required to resign as federal judges while serving on the Commission. See id. § 992(c).

⁶⁹ See id. §§ 991(a), 992(a).

⁷⁰ See id. § 991(a).

⁷¹ Id. § 994(a)(1). Congress directed the Commission to formulate guidelines that “provide certainty and fairness in meeting the purposes of sentencing,” while “avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct” and “maintaining sufficient flexibility to permit individualized sentences” where appropriate. Id. § 991(b)(1)(B). The Guidelines are to establish, “for each category of offense involving each category of defendant, . . . a sentencing range.” Id. § 994(b)(1). The range must be consistent with provisions of the federal criminal code and may vary by no more than 25% or six months from the minimum to the maximum, except that where the minimum sentence is 30 years or more, the maximum may be life imprisonment. See id. § 994(b)(1)-(2). The Commission also has continuing responsibility to review the Sentencing Guidelines regularly, including considering petitions by defendants to modify the Guidelines. See id. § 994(o)-(u). Amendments to the Guidelines take effect automatically unless, within 180 days after they are reported, specific legislation provides otherwise. See id. § 994(p).

mandate, the Sentencing Commission grouped criminal offenses and defendants into categories and established a matrix or grid whereby the sentencing range for each defendant is determined by reference to the seriousness of the present crime and the defendant's criminal history.⁷² After a statutorily imposed six-month waiting period,⁷³ during which Congress took no negative action,⁷⁴ the United States Sentencing Guidelines went into effect on November 1, 1987, and applied immediately to most federal crimes committed after that date.⁷⁵

Contemporaneous observers described the Guidelines as "the most dramatic change in our Nation's history" in the "Federal crimi-

⁷² See Sentencing Guidelines and Policy Statements, *supra* note 8, at 1.1-1.12.

The Federal Sentencing Guidelines are, in a sense, nothing more than a set of instructions for one chart—the Sentencing Table. The goal of guidelines calculations is to arrive at numbers for the vertical (offense level) and horizontal (criminal history category) axes on the Sentencing Table grid, which in turn generate an intersection in the body of the grid. Each such intersection designates a *sentencing range* expressed in months.

Frank O. Bowman, III, *Coping With "Loss": A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines*, 51 Vand. L. Rev. 461, 472-73 (1998) (footnote omitted). For a readable and concise explanation of the Sentencing Guidelines "grid" and the calculation of a sentence under the Guidelines, see generally Frank O. Bowman, III, *The Quality of Mercy Must be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 Wis. L. Rev. 679, 693-704 [hereinafter Bowman, *Quality of Mercy*].

⁷³ See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. 2, ch. 2, § 235(a)(1)(B)(ii)(III), 98 Stat. 2032 (reprinted in note to 18 U.S.C. § 3551).

⁷⁴ The House of Representatives defeated a proposal to delay implementation of the Guidelines. See 133 Cong. Rec. 26,683-84 (1987).

⁷⁵ See Sentencing Guidelines and Policy Statements, *supra* note 8 at 1.1, 1.12 (noting that "[b]ecause of time constraints and the nonexistence of statistical information, some offenses that occur infrequently are not considered in this initial set of guidelines," and that Commission had also deferred promulgation of Guidelines pertaining to certain sanctions for organizational defendants).

It is somewhat inaccurate to term the Commission's work as mere "guidelines." The criminal code states that a sentencing court:

[S]hall impose a sentence of the kind, and within the range [set forth in the Guidelines] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines [and] that should result in a sentence different from that described.

18 U.S.C. § 3553(b) (1994).

The sentencing judge must state the reasons for imposing the sentence selected and must give "the specific reason for the imposition of a sentence different from that described" in the applicable guideline. *Id.* § 3553(c). Congress expected that less than 20% of sentences would be set outside the Guidelines. See S. Rep. No. 98-225, at 52 n.71 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3235. On the power of sentencing judges to depart from the Guidelines, see generally *Koon v. United States*, 518 U.S. 81, 95-100 (1996) (expanding authority of district judges to depart downward from Guidelines by adopting abuse of discretion as standard for appellate review of district court evaluation of whether factors had been adequately considered by Commission in formulating guideline sentence).

nal justice system."⁷⁶ As one member of Congress put it, the Sentencing Reform Act and the Guidelines "rewrite the face of sentencing in this country as we know it, and have known it for over 200 years."⁷⁷ From an indeterminate sentencing system under which judges were given broad authority to decide whether an offender would be incarcerated and for how long,⁷⁸ the Sentencing Reform Act moved to a binding sentencing guideline regime that substantially restrains judicial discretion.⁷⁹ As a leading federal judge later stated, "the Guidelines system is probably the most significant development in 'judging' in the federal judicial system since the adoption in 1938 of the Federal Rules of Civil Procedure."⁸⁰

The Sentencing Guidelines, which generally were perceived as imposing more severe punishment, especially for drug offenses,⁸¹ seized the attention of the criminal defense bar.⁸² Shortly after the implementation of the new Sentencing Guidelines regime, criminal defendants seeking plea bargains or facing sentencing filed challenges to the Guidelines and to the Commission that promulgated them.⁸³

⁷⁶ 133 Cong. Rec. 26,367 (1987) (remarks of Rep. Conyers).

⁷⁷ *Id.* at 26,372 (remarks of Rep. Synar).

⁷⁸ See Bowman, *Quality of Mercy*, *supra* note 72, at 682 ("Prior to [enactment of the Guidelines], the judge had virtually unlimited discretion to sentence a convicted defendant anywhere within the range created by the statutory maximum and minimum penalties for the offense or offenses of conviction.").

⁷⁹ On the history of sentencing, the problems in disparities in sentencing among judges, and Congress's conclusions in adopting a mandatory guideline system, see generally S. Rep. No. 98-225, at 37-65 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3220-48. For concise statements of the history and background of sentencing reform and the Sentencing Guidelines from different positions (one favorable toward and one critical of the Guidelines), see Bowman, *Quality of Mercy*, *supra* note 72, at 680-704 (favorable); Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 Harv. L. Rev. 1938, 1940-51, 1951-60 (1988) (critical).

⁸⁰ José A. Cabranes, *Sentencing Guidelines: A Dismal Failure*, 207 N.Y. L.J., Feb. 11, 1992, at 2 [hereinafter Cabranes, *Dismal Failure*].

⁸¹ See Bowman, *Quality of Mercy*, *supra* note 72, at 740 (stating that "the Guidelines, taken together with mandatory minimum sentences, compel the imposition of very long sentences on drug sellers," sentences that "are long relative to the previously settled expectations of the participants in the federal system"); Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 Yale L.J. 2043, 2047 (1992) ("[T]he Commission produced guidelines that actually increase the overall severity [of federal sentences.]"); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L. Rev. 223, 284-85 (1993) (stating that, in keeping with congressional intent, "the percentage of defendants being imprisoned and the length of prison terms have increased" under Sentencing Guidelines).

⁸² Charles Fried, *Order and Law* 165 (1991) ("The defense lawyers . . . hated the guidelines, which meant stiffer sentences and less to bargain over.").

⁸³ See Ruth Marcus, *Federal Sentences in Limbo as Guidelines Challenged*, Wash. Post, Mar. 2, 1988, at A19 (reporting that defendants charged with crimes committed after November 1, 1987, effective date of new federal Sentencing Guidelines, were objecting to

According to our data, the first district court to consider the constitutionality of the Guidelines issued its ruling on January 25, 1988, and the litigation continued until December 19, 1988, when the last district court to consider the question issued its ruling.

The constitutional objections fell into four basic categories,⁸⁴ generally raised together in a single case: First, and most prominently, the Sentencing Commission was attacked on separation of powers grounds as improperly exercising nonjudicial rulemaking powers when the entity was statutorily located within the judicial branch.⁸⁵ The government was divided in its defense of the Commission against this particular challenge.⁸⁶ Adhering to the Reagan Administration's traditional or formalist view of separation of powers,⁸⁷ the Department of Justice took the position that the Commission was indeed exercising an executive function—rulemaking—that cannot be consigned to the judicial branch.⁸⁸ However, the Department con-

their constitutionality, resulting in spreading "epidemic of challenges"); David G. Savage, Court Fights Ahead Over New Sentencing Rules: Novel Attempt at Fairness is Attacked as a Violation of Separation of Powers, *L.A. Times*, Apr. 8, 1988, at 18 (reporting growing number of challenges to Sentencing Guidelines filed by defense lawyers across country and quoting leading participants from both sides as agreeing that result would be uncertainty, even chaos, in sentencing procedures until Supreme Court resolved issue).

⁸⁴ Each of these categories of constitutional attacks serves as a dependent variable unit for statistical analysis in our study. See *infra* Part IV.B.2.

⁸⁵ See, e.g., *United States v. Velez-Naranjo*, 691 F. Supp. 584, 587 (D. Conn. 1988) (accepting defendant's argument that Sentencing Commission exercises executive power and thus its placement in judicial branch offends Constitution); *United States v. Tolbert*, 682 F. Supp. 1517, 1523-25 (D. Kan. 1988) (holding that placement of Sentencing Commission within judiciary violates separation of powers as Commission's power to issue substantive Sentencing Guidelines goes beyond scope of judiciary's authority to adjudicate cases or controversies).

⁸⁶ In this and the following paragraphs, we use the term "government" to refer to positions held both by the Department of Justice and by the Sentencing Commission. Whenever the two entities differed on the appropriate understanding of the Sentencing Commission's place in the constitutional scheme of government (the separation of powers issue), we have identified them individually as the "Department" or "Department of Justice" and "Sentencing Commission" or "Commission."

⁸⁷ "A formalist approach seeks to maintain three distinct branches of government, and to prevent commingling of the three central powers of making the laws, executing the laws, and interpreting the laws." The Supreme Court, 1988 Term—Leading Cases, 103 Harv. L. Rev. 137, 280 n.6 (1989) (citing Harold J. Krent, Separating the Strands in Separation of Powers Controversies, 74 Va. L. Rev. 1253, 1254 (1988)).

⁸⁸ Draft Brief on the Constitutionality of the Work of the Sentencing Commission, Department of Justice, Civil Division (Redraft March 28, 1988) at 4, 8-17, 26-34 [hereinafter DOJ Model Brief] (on file with the *New York University Law Review*). This model brief, which was obtained from the Department of Justice under a Freedom of Information Act request, was filed pursuant to the Attorney General's direction in every district court proceeding in which a constitutional challenge to the Sentencing Guidelines was made. We rely on model briefs here for description of the parties' arguments for several reasons. First, although the arguments underwent some refinement during the year, the essentials of each party's position were clearly articulated in model briefs. Second, examining the ac-

tended that the statutory assignment or "label" is merely precatory and without substantive effect, so that the Commission could be upheld as being essentially an executive branch agency.⁸⁹ As *amicus curiae*,⁹⁰ the Sentencing Commission participated in these cases to assert that the Commission's guideline-promulgation activity is sufficiently related to the judicial function to justify location in the judicial branch.⁹¹ As a consequence, the Sentencing Guidelines cases

became three-cornered fights: defendants arguing the invalidity of the [Sentencing Reform] Act on any terms, the Department arguing the Act's validity only if the Commission were (contrary to the words of the statute) viewed as being part of the Executive Branch, and [the Sentencing Commission] arguing for the validity of the scheme exactly as written.⁹²

Second, the mandatory participation of judges in an extra-judicial capacity was criticized as impairing the work of the judicial branch

tual briefs from each of the hundreds of cases would not only be costly and inordinately time-consuming (even if the briefs could be retrieved from federal records centers), but would add almost no relevant information because most briefs followed the format of a model brief with the exception of individually-tailored statements of the nature of the charge and procedural history of particular defendant's cases. (In addition, the DOJ Model Brief was supplemented, as appropriate, with argument addressing the "core" function nondelegation issue. See *infra* note 100.) Third, the written district court opinions, which were reviewed for this study, confirm the continued adherence of the parties to the positions articulated in the model briefs.

⁸⁹ See *id.* at 4-5, 40-50; see also, e.g., *United States v. Smith*, 686 F. Supp. 1246, 1251-53 (W.D. Tenn. 1988) (holding that Sentencing Commission was actually in executive branch despite recitation in statute that it was part of judicial branch); *United States v. Ortega Lopez*, 684 F. Supp. 1506, 1516 & n.1 (C.D. Cal. 1988) (en banc) (Hupp, J., dissenting) (accepting Department's position that judicial branch "label" is not controlling).

⁹⁰ See Motion of the United States Sentencing Commission for Leave to File a Brief as *Amicus Curiae* at 2, *United States v. Allen*, Cr. No. S-88-024-EJG (E.D. Cal. 1988) ("The Department of Justice has consented to the Commission's request that it be allowed to file a brief as *amicus curiae* in this and other cases involving a challenge to the Sentencing Guidelines."). The Sentencing Commission also developed a model brief that it filed as *amicus curiae* in district court proceedings. See *infra* note 91.

⁹¹ See Brief for the United States Sentencing Commission as *Amicus Curiae* in Support of the Constitutionality of the Sentencing Guidelines, United States Sentencing Commission, at 1-3, 25-27, 35-48 (Feb. 8, 1988) [hereinafter Sentencing Commission Model Brief] (on file with the *New York University Law Review*); Fried, *supra* note 82, at 165 ("The Chairman and the most influential members of the Commission were all judges, and they resented any suggestion that they were now part of the Executive Branch as well as any aspersions cast on their independence."); see also, e.g., *United States v. Macias-Pedroza*, 694 F. Supp. 1406, 1413-16 (D. Ariz. 1988) (en banc) (holding that Commission is properly regarded as being located in judicial branch because it operates in aid of judicial function); *United States v. Ruiz-Villanueva*, 680 F. Supp. 1411, 1421-22 (S.D. Cal. 1988) (same).

⁹² Fried, *supra* note 82, at 166; see also Marcus, *supra* note 83, at 32 (describing different approaches of Department of Justice and Sentencing Commission in defending Guidelines in district courts).

and undermining the impartiality of the judiciary.⁹³ In addition, the president's power to remove members of the Commission for cause was cited as a separation of powers violation, by allowing the executive to dismiss a member of the judicial branch.⁹⁴ The government responded that, while the Commission membership must include three federal judges, the service of any single judge is voluntary and thus an incidental intrusion upon the judiciary.⁹⁵ Citing historical precedent as early as the Washington and Adams administrations, the government contended that judicial service in a nonjudicial capacity would not impair the function or impartiality of the judicial branch.⁹⁶ Finally, the government justified the president's removal power as applying only to service on the Commission, not extending to the judge's judicial position or role.⁹⁷

Third, the Commission's statutory authority to promulgate Guidelines was attacked as an improper or excessive delegation of legislative power. Some defendants contended that Congress is prohibited from delegating authority in the area of criminal sentencing, asserting that this is a "core legislative field" in which any delegation is impermissible.⁹⁸ Other challengers claimed that the Sentencing Reform Act provides insufficient direction to the Commission in its

⁹³ See, e.g., *United States v. Wilson*, 686 F. Supp. 284, 285-86 (W.D. Okla. 1988) (accepting defendant's argument that mandatory service of three judges on Commission impairs their ability to perform their constitutional judicial role and undermines their impartiality and independence); *United States v. Elliott*, 684 F. Supp. 1535, 1539-40 (D. Colo. 1988) (accepting defendant's argument that mandatory participation of three Article III judges on Sentencing Commission contravenes separation of powers doctrine).

⁹⁴ See, e.g., *United States v. Serpa*, 688 F. Supp. 1398, 1401 (D. Neb. 1988) (accepting defendant's argument that president's removal power over commissioners, including judge members, violates separation of powers doctrine); *United States v. Cortes*, 697 F. Supp. 1305, 1308-11 (S.D.N.Y. 1988) (same).

⁹⁵ See DOJ Model Brief, *supra* note 88, at 18-19, 24-25; Sentencing Commission Model Brief, *supra* note 91, at 6, 48-55; see also, e.g., *United States v. Franz*, 693 F. Supp. 687, 692 (N.D. Ill. 1988) (holding that presence of Article III judges on Sentencing Commission is not unconstitutional because judges serve voluntarily); *United States v. Alves*, 688 F. Supp. 70, 76-78 (D. Mass. 1988) (holding that service of Article III judges as voluntary participants on Sentencing Commission does not impair judicial function).

⁹⁶ See DOJ Model Brief, *supra* note 88, at 19-24.

⁹⁷ See *id.* at 17-19; Sentencing Commission Model Brief, *supra* note 91, at 5, 63-64; see also, e.g., *United States v. Weidner*, 692 F. Supp. 968, 985-87 (N.D. Ind. 1988) (holding that president's power to remove commissioners does not impair independence of judiciary); *United States v. Landers*, 690 F. Supp. 615, 623 (W.D. Tenn. 1988) (same).

⁹⁸ See, e.g., *United States v. Dahlin*, 701 F. Supp. 148, 150-51 (N.D. Ill. 1988) (holding that decisions involving policy choices on core fundamental liberties questions, such as defining and punishing criminal conduct, are "nondelegable" and may be exercised only by Congress); *United States v. Williams*, 691 F. Supp. 36, 41-53 (M.D. Tenn. 1988) (en banc) (holding that promulgation of Sentencing Guidelines that are binding on court is nondelegable legislative function because only Congress may fix punishment for engaging in criminal conduct).

work, that is, fails to provide an "intelligible principle" to guide the Commission's judgment about the sentences that should be imposed in particular types of cases.⁹⁹ The government responded that the courts have never invalidated a statute on the ground that certain "core" legislative functions are nondelegable,¹⁰⁰ and that the statutory delegation here provides sufficiently specific directives to the Commission to pass muster under the nondelegation doctrine.¹⁰¹

Fourth, the very concept of binding Sentencing Guidelines was directly questioned as violative of a purported substantive due process right of criminal defendants to individualized sentencing.¹⁰² Under this theory, each defendant is entitled to an individual evaluation of his conduct and the particular circumstances of the case by a sentencing judge empowered with full discretion.¹⁰³ The government responded that there was no historical or precedential basis for a

⁹⁹ See, e.g., *United States v. Bogle*, 689 F. Supp. 1121, 1162 (S.D. Fla. 1988) (en banc) (Aronovitz, J., specially concurring) (arguing that "the delegation of legislative power to the Sentencing Commission is so excessive as to violate the basic premises of our constitutional scheme of government" because "[f]ew meaningful restrictions on [the Commission's] discretion are set forth" in statute); *United States v. Brodie*, 686 F. Supp. 941, 950 (D.D.C. 1988) (stating that Sentencing Reform Act "would probably fail to pass muster [under delegation doctrine], for Congress has given to the Sentencing Commission a mandate of such vagueness that it constitutes no real direction at all").

¹⁰⁰ Although the DOJ Model Brief did not address the "core" function nondelegation argument, government briefs filed in the district courts added that argument, and the government's response is well-stated in the briefs submitted to appellate courts during this same time period. See Brief for the United States at 60-62, *United States v. Frank*, 864 F.2d 992, 1010-12 (3d Cir. 1988) (No. 88-3220); Sentencing Commission Model Brief, *supra* note 91, at 27-30; see also, e.g., *United States v. Myers*, 687 F. Supp. 1403, 1409 (N.D. Cal. 1988) (rejecting argument that any legislative function is *per se* nondelegable as "core function"); *United States v. Sparks*, 687 F. Supp. 1145, 1150-51 (E.D. Mich. 1988) (same).

¹⁰¹ See DOJ Model Brief, *supra* note 88, at 50-56; Sentencing Commission Model Brief, *supra* note 91, at 31-35; see also, e.g., *United States v. Macias-Pedroza*, 694 F. Supp. 1406, 1411-13 (D. Ariz. 1988) (en banc) (holding that Sentencing Reform Act set out intelligible standards and statements of purpose and thus was constitutional delegation of legislative power to Sentencing Commission); *United States v. Richardson*, 685 F. Supp. 111, 113-14 (E.D.N.C. 1988) (same).

¹⁰² See, e.g., *United States v. Brittman*, 687 F. Supp. 1329, 1354-57 (E.D. Ark. 1988) (holding that Guidelines violate defendant's due process right to individualized sentencing); *United States v. Frank*, 682 F. Supp. 815, 817-19 (W.D. Pa. 1988) (same).

¹⁰³ See, e.g., *United States v. Alafriz*, 690 F. Supp. 1303, 1310 (S.D.N.Y. 1988) (invalidating Guidelines on due process grounds, saying that "sentencing requires a specific assessment of an individual and an individual's circumstances, as it involves an individual's constitutionally protected right to liberty"); *United States v. Martinez-Ortega*, 684 F. Supp. 634, 636 (D. Idaho 1988) (holding that "the negation of the sentencing judge's discretion violates the due process clause by preventing the defendant from having an opportunity to convince the sentencing judge that there are circumstances which override the point allocations of the Guidelines").

substantive right to individualized sentencing, outside of the unique context of death penalty cases.¹⁰⁴

During a period of less than one year,¹⁰⁵ nearly 300 federal district judges were compelled to address a question of major constitutional importance and significant public concern. The federal district courts were sharply divided in their responses to these legal challenges. Each district judge was forced to decide independently whether to sentence defendants under the pre- or post-Sentencing Reform Act system; indeed, even different judges within the same district followed conflicting sentencing approaches based on divergent views of the validity of the Guidelines.¹⁰⁶ Ultimately, as noted in our study, 179 judges (60.9%) invalidated the Guidelines, while 115 judges (39.1%) sustained the Guidelines against constitutional challenge.¹⁰⁷ This series of constitutional challenges fomented a crisis in the federal criminal justice system, as the widespread and entrenched division among district courts created uncertainty about the sentencing process nationwide. As one district judge commented at the time, federal criminal sentencing had dissolved into chaos.¹⁰⁸

To resolve this intolerable situation, the Supreme Court took the unusual step in *Mistretta v. United States*¹⁰⁹ of granting certiorari "before judgment,"¹¹⁰ that is, accepting a case immediately upon ap-

¹⁰⁴ See Brief for the United States at 67-75, *United States v. Frank*, 864 F.2d 992 (3d Cir. 1988) (No. 88-3220); see also, e.g., *United States v. Weidner*, 692 F. Supp. 968, 971-72 (N.D. Ind. 1988) (rejecting due process right to individualized sentencing); *United States v. Seluk*, 691 F. Supp. 525, 539 (D. Mass. 1988) (holding that congressional choice to reduce exercise of discretion by judges was not offensive to due process standards).

¹⁰⁵ The district court level Sentencing Guidelines litigation continued from January 25, 1988 (the first district court ruling) to December 19, 1988 (the last district court ruling).

¹⁰⁶ Compare *United States v. Ruiz-Villanueva*, 680 F. Supp. 1411 (S.D. Cal. 1988) (upholding Guidelines), with *United States v. Lopez-Barron*, 685 F. Supp. 725 (S.D. Cal. 1988), and *United States v. Arnold*, 678 F. Supp. 1463 (S.D. Cal. 1988) (both invalidating Guidelines); compare *United States v. Knox*, 694 F. Supp. 777 (W.D. Wash. 1988) and *United States v. Amesquita-Padilla*, 691 F. Supp. 277 (W.D. Wash. 1988) (both upholding Guidelines), with *United States v. Wylie*, No. CR88-04T (W.D. Wash. Mar. 29, 1988), *United States v. Hines*, No. CR88-004WD (W.D. Wash. May 11, 1988), *United States v. Dalton*, No. CR88-2C (W.D. Wash. June 16, 1988), and *United States v. Nordall*, No. CR87-067TB (W.D. Wash. April 21, 1988) (all invalidating Guidelines). Based upon our research, judges divided internally over the validity of the Guidelines in 28 district courts.

¹⁰⁷ See *infra* Table 3.

¹⁰⁸ See *United States v. Ortega Lopez*, 684 F. Supp. 1506, 1520 & n.12 (C.D. Cal. 1988) (en banc) (Hupp, J., dissenting).

¹⁰⁹ 488 U.S. 361 (1989).

¹¹⁰ *Id.* at 371 (explaining that Supreme Court had granted certiorari before judgment "[b]ecause of the 'imperative public importance' of the issue" and "because of the disarray among the Federal District Courts"). The *Mistretta* case was selected as the vehicle for a certiorari petition because it was one of the first district rulings that had been perfected for appeal, because it raised the central separation of powers and nondelegation doctrine issues, and because both the Department of Justice and *Mistretta*'s counsel agreed to seek

peal from the district court and without the intervening step of a court of appeals disposition.¹¹¹

Prior to the Supreme Court's resolution of the dispute, but after the grant of certiorari in *Mistretta*, two courts of appeals addressed the issue, reaching opposite conclusions.¹¹² The United States Court of Appeals for the Ninth Circuit, in August 1988, invalidated the Sentencing Guidelines on separation of powers grounds.¹¹³ In an opinion authored by Judge Alex Kozinski, a prominent Reagan appointee, the court held that mandatory appointment of judges to an entity engaged in political policymaking, rather than judicial functions, undermines the actual and perceived independence and impartiality of the judiciary.¹¹⁴ By contrast, the United States Court of Appeals for the Third Circuit, in November 1988, sustained the Guidelines against constitutional challenge.¹¹⁵ The Third Circuit rejected arguments that the Sentencing Guidelines violate substantive due process by circumscribing the individualized discretion of the sentencing judge¹¹⁶ and that Congress had unlawfully delegated legislative power to the Commission.¹¹⁷ The court also held that the composition and location of the Commission neither aggrandizes the powers of the judiciary nor impairs its functions.¹¹⁸

Supreme Court review. As the coauthor of this study who was involved in the litigation of these cases reports, the Solicitor General's office had initially identified another case as the candidate to bring this matter to the Supreme Court's attention, but the defendant's counsel in that case proved uncooperative. Solicitor General Charles Fried, on behalf of the United States, concluded that it would both expedite resolution of this pressing matter and enhance the likelihood that the Court would accept review of a case off the ordinary track through the court of appeals if both sides joined in petitioning for review.

¹¹¹ Under 28 U.S.C. § 1254(1) (1994), the Supreme Court may grant a petition for a writ of certiorari to review any case that is "in" the court of appeals, even if a final judgment has not yet been entered by that court. See *United States v. Nixon*, 418 U.S. 683, 690-92 (1974). If a notice of appeal has been filed from the district court, and it is properly docketed in the court of appeals, then a party may seek direct review by the Supreme Court before judgment in the court of appeals. See *id.* The Supreme Court grants "certiorari before judgment" about once a decade and only in cases of pressing importance. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 667-68 (1981) (Iran hostage agreement); *Nixon*, 418 U.S. at 691-92 (subpoena to president); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (steel seizure case); *Ex parte Quirin*, 317 U.S. 1 (1942) (president's assignment of jurisdiction over trial of belligerent saboteurs to military tribunal).

¹¹² See *Mistretta*, 488 U.S. at 371 n.6 (1989) (observing that two courts of appeals had addressed issue since it had granted certiorari, one invalidating Guidelines and another upholding them).

¹¹³ See *Gubiensio-Ortiz v. Kanahele*, 857 F.2d 1245 (9th Cir. 1988), vacated sub nom. *United States v. Chavez-Sanchez*, 488 U.S. 1036 (1989).

¹¹⁴ See *id.* at 1251-66.

¹¹⁵ See *United States v. Frank*, 864 F.2d 992 (3d Cir. 1988).

¹¹⁶ See *id.* at 1008-10.

¹¹⁷ See *id.* at 1010-12.

¹¹⁸ See *id.* at 1012-16.

On January 18, 1989, the Supreme Court resolved the crisis when it held in *Mistretta v. United States*¹¹⁹ that the Sentencing Guidelines were constitutional, neither amounting to an excessive delegation of legislative power nor violating the separation of powers by locating the Sentencing Commission in the judicial branch.¹²⁰ The Court determined that the Sentencing Reform Act provides the Commission with sufficiently specific and detailed guidance in the intricate task of formulating Sentencing Guidelines, thus satisfying the "intelligible principle" test for congressional delegations of power.¹²¹ Further, applying a "flexible understanding of separation of powers,"¹²² the Court endorsed the Commission as a constitutionally valid entity, both in its location in the judicial branch and in its judicial membership.¹²³ While acknowledging that "the Commission wields rulemaking power and not the adjudicatory power exercised by individual judges when passing sentence,"¹²⁴ the Court ruled that "Congress may delegate to the Judicial Branch nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary."¹²⁵ Given the longstanding primary role of the judiciary in the field of sentencing,¹²⁶ the Court concluded that "the placement of the Sentencing Commission in the Judicial Branch has not increased the Branch's authority" at the expense of the other branches.¹²⁷

The Court also approved the voluntary service of judges on the Commission. In light of the historical practice of the Founders, continuing into the modern era, the Court found no absolute constitu-

¹¹⁹ 488 U.S. 361, 311-19 (1989). For relatively contemporaneous scholarly comment on *Mistretta*, see Stephen L. Carter, Constitutional Improprieties: Reflections on *Mistretta*, *Morrison*, and Administrative Government, 57 U. Chi. L. Rev. 357 (1990); Martin H. Redish, Separation of Powers, Judicial Authority, and the Scope of Article III: The Troubling Cases of *Morrison* and *Mistretta*, 39 DePaul L. Rev. 299, 311-19 (1989); Julia L. Black, Note, The Constitutionality of Federal Sentences Imposed Under the Sentencing Reform Act of 1984 After *Mistretta v. United States*, 75 Iowa L. Rev. 767 (1990); Mary Buffington, Comment, Separation of Powers and the Independent Governmental Entity After *Mistretta v. United States*, 50 La. L. Rev. 117 (1989); Mark Nielsen, Comment, *Mistretta v. United States* and the Eroding Separation of Powers, 12 Harv. J.L. & Pub. Pol'y 1049 (1989); Kristin L. Timm, Note, "The Judge Would Then Be the Legislator": Dismantling Separation of Powers in the Name of Sentencing Reform—*Mistretta v. United States*, 65 Wash. L. Rev. 249 (1990); The Supreme Court, 1988 Term—Leading Cases, *supra* note 87, at 279-90.

¹²⁰ See *Mistretta*, 488 U.S. at 372-97.

¹²¹ See *id.* at 372-79.

¹²² *Id.* at 381.

¹²³ See *id.* at 380-411.

¹²⁴ *Id.* at 395.

¹²⁵ *Id.* at 388.

¹²⁶ See *id.* at 390-91.

¹²⁷ *Id.* at 395.

tional prohibition of judges undertaking extrajudicial duties.¹²⁸ Framing the question as “whether a particular extrajudicial assignment undermines the integrity of the Judicial Branch,”¹²⁹ the Court found that enlistment of judges is appropriate where the subject lies close to the judicial function,¹³⁰ describing sentencing policy as “a matter uniquely within the ken of judges.”¹³¹ Finally, the Court rejected the challenge to the president’s removal power.¹³² Because the president has the power to remove members of the Commission only for cause, and has no authority to remove or diminish the status of the judges as judges, the Court found no risk that the president could exercise undue influence over the judiciary or threaten judicial independence.¹³³

Justice Scalia, a Reagan appointee to the high Court, was the sole dissenter.¹³⁴ He contended that a judicial branch entity with the power to establish “legally binding prescriptions governing application of governmental power against private individuals”¹³⁵ is incompatible with constitutional separation of powers principles.¹³⁶ As a consequence of the Court’s decision, he said, there henceforth “may be agencies ‘within the Judicial Branch’ (whatever that means), exercising governmental powers, that are neither courts nor controlled by courts, nor even controlled by judges.”¹³⁷ More fundamentally, he criticized the Sentencing Reform Act as a “pure delegation of legislative power” unrelated to the exercise of executive or judicial power.¹³⁸ Arguing that the Commission’s function is substantive lawmaking “completely divorced from any responsibility for execution of the law or adjudication of private rights under the law,”¹³⁹ he described the Commission as “a sort of junior-varsity Congress.”¹⁴⁰

¹²⁸ See *id.* at 397-404 (citing simultaneous service of first Chief Justice, John Jay, as Ambassador to England; of Chief Justice Ellsworth as minister to France; and of Chief Justice Marshall as Secretary of State; service of five justices on election commission that resolved disputed election of 1876; service of Justice Jackson as prosecutor at Nuremberg trials; presiding of Chief Justice Warren over commission investigating assassination of President Kennedy).

¹²⁹ *Id.* at 404.

¹³⁰ See *id.* at 407-08.

¹³¹ *Id.* at 412.

¹³² See *id.* at 409-11.

¹³³ See *id.*

¹³⁴ See *id.* at 413-27 (Scalia, J., dissenting).

¹³⁵ *Id.* at 413.

¹³⁶ See *id.* at 413, 422-27.

¹³⁷ *Id.* at 425.

¹³⁸ *Id.* at 420.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 427.

2. *The Sentencing Guidelines Cases Database*

The database of district court decisions on the constitutionality of the Sentencing Guidelines during the 1988 period draws primarily upon a list maintained by the Sentencing Commission staff, consisting of decisions made by district judges across the nation, both upholding and striking down the Sentencing Guidelines. As decisions were rendered by district courts during 1988, the Sentencing Commission staff received reports from the district courts, from the United States Attorneys' offices and the Department of Justice, and from counsel for the Sentencing Commission who participated in district court hearings on the validity of the Guidelines. Commission staff supplemented the list through a confidential telephone survey of probation offices and district courts in late 1988 and early 1989, asking whether or not individual judges were applying the Guidelines.¹⁴¹ We also searched the

¹⁴¹ John Steer, the General Counsel of the Sentencing Commission, generously granted us access to this list, subject to an agreement not to publicly release the names of those ruling judges who had not issued written decisions. A caveat should be noted concerning the Sentencing Commission information. When the Commission staff conducted the supplemental telephone survey, they focused primarily upon district judges who were not following the Guidelines. Thus, when an individual district judge was not applying the Guidelines, the staff recorded information about any case decision by that judge invalidating the Guidelines on constitutional grounds. But when an individual district judge was applying the Guidelines, no additional information was solicited. In substantial part, this reflects the fact that many judges applying the Guidelines did so as a matter of course and without a formal decision upholding the constitutionality of the Guidelines. Thus, the fact that a judge followed the Guidelines in sentencing did not necessarily mean that the judge had ruled favorably or at all upon a constitutional challenge to the Guidelines. By contrast, nearly all judges who declined to apply the Guidelines in sentencing did so by reason of a constitutional objection. (The Sentencing Commission staff did note a few judges who had made no formal ruling on the constitutionality question but were not applying the Guidelines to sentences. These judges have not been included within this study, which is limited to study of constitutionality rulings.) In sum, the supplemental information obtained from the telephone survey provides rather complete information about a few additional district judges who had invalidated the Guidelines, which information is included in the database for this study. However, a judge who was recorded in the supplemental survey as applying the Guidelines is included in our database only if there is an independent confirmation (either from the primary Sentencing Commission decision list or written decisions available on Westlaw or Lexis) that an actual decision addressing the constitutionality of the Guidelines had been rendered.

For this reason, the database prepared for this study should be complete (or as complete as humanly possible) with respect to decisions by district judges invalidating the Guidelines. However, the database may fall short of perfect completeness with respect to decisions by district judges upholding the Guidelines. Nevertheless, the Sentencing Commission staff's telephone survey added only 18 judges to the list of judges invalidating the Guidelines, and we therefore assume that a similarly small number of additional judges would have been added to the list of judges upholding the Guidelines had sufficient information been available to designate them. In any event, at this point in time, it would be impossible to replicate the original sources of information and create a more complete database.

Westlaw and Lexis electronic research databases to confirm that all rulings were included in the list.¹⁴²

The resulting database includes a total of 293 district court judges and 294 observations (one judge having issued a ruling upholding the Guidelines only to reverse himself in another case four months later).¹⁴³ Although information is not complete in every instance, the Sentencing Commission list contains the name of the judge, the district, the name of the criminal case, the case number, the date of the decision, and the outcome ("constitutional" or "unconstitutional") of the challenge to the Guidelines. This list includes tallies of oral rulings from the bench and unpublished written decisions that are not available in case reporters or electronic databases.

For the judicial reasoning component of our study, we drew primarily from a file of written opinions maintained by the Sentencing Commission during 1988. In addition, we searched the Westlaw and Lexis electronic databases for other opinions, discovering only a couple of additional relevant opinions. The Sentencing Commission also tallied 26 judges as having issued written opinions which were not included in the Sentencing Commission's file. By writing to the clerks of the various district courts, obtaining documents from the Federal Records Centers, and researching on Westlaw and Lexis, we were able to obtain 22 of these unpublished opinions and discovered that two of the listed judges had issued oral, not written, decisions.¹⁴⁴

¹⁴² The Westlaw and Lexis electronic databases were searched for all rulings on the constitutionality of the Sentencing Guidelines. These databases primarily contain decisions that were officially reported in the Federal Supplement, although quite a few unpublished decisions are also included.

¹⁴³ For purposes of our study, three judges were eliminated from the database: (1) a district judge from the Virgin Islands for whom crucial data were unavailable or nonexistent given the anomalous locale; (2) a district judge who was included in the Sentencing Commission's tally as upholding the constitutionality of the Guidelines but who, as we discovered upon review of his written opinion, had applied the Guidelines without addressing the constitutionality question; and (3) a court of appeals judge who ruled on a constitutional challenge to the Guidelines while sitting as a district court judge by designation. See *United States v. Estrada*, 680 F. Supp. 1312 (D. Minn. 1988) (Heaney, J.), *rev'd*, 873 F.2d 1449 (8th Cir. 1989) (unpublished table decision). Only six court of appeals judges ruled upon the constitutionality of the Guidelines, including Judge Heaney, the members of the panels in the Third Circuit (one of whom dissented on other grounds without addressing the constitutionality issue), and the Ninth Circuit. See *United States v. Frank*, 864 F.2d 992 (3d Cir. 1988); *Gubiensio-Ortiz v. Kanahele*, 857 F.2d 1245 (9th Cir. 1988), *vacated sub nom.* *United States v. Chavez-Sanchez*, 488 U.S. 1036 (1989). Accordingly, court of appeals judges were excluded from our study. Moreover, many of the variables included in our study are relevant only with respect to district court judges.

¹⁴⁴ We were unable to retrieve opinions for only two judges who we had at least some indication may have prepared written opinions. These two judges are necessarily treated in our study as though they issued unwritten decisions.

Based upon this database, 188 (63.9% of the 294 observations) participated in written opinions upholding or invalidating the Sentencing Guidelines that could be classified.¹⁴⁵ Of these, 98 judges sitting individually issued written decisions, and 90 judges either authored or joined multiple-judge opinions issued by *en banc* district courts.¹⁴⁶

3. The Value and Limitations of the Sentencing Guidelines Decisions for Empirical Study

a. Resolving the Problem of Incomparability: The Identical Legal Problem. The fungible nature of the legal problem in this unique series of cases resolves the comparability problem that has plagued prior empirical studies of judicial decisionmaking.¹⁴⁷ In addition to the virtually identical nature of the legal problem, the presentation of model briefs to the many district judges hearing the constitutional challenges to the Guidelines¹⁴⁸ effectively controlled for

¹⁴⁵ Upon reviewing the written decisions, we determined that a few decisions included in the initial set from the Sentencing Commission were so cursory and lacking in analysis as to amount to nothing more than written confirmations of bench announcements. Because these documents provided no basis for analyzing the judge's reasoning, we removed them from the opinion content analysis stage of the study. However, if an opinion provided any statement of reasons, even if limited to the adoption by reference of another judge's opinion, the opinion was included in our content analysis at least for some purposes. A few judges issued more than one written decision, but with only one exception these multiple decisions were identically-worded opinions rendered in different cases within a few days of one another. On the view that the more important decision is the one upon which the judge initially "took a stand" for or against the Guidelines, the first opinion is used for dating purposes. For the one judge who issued a second opinion supplementing the substance of the first, both opinions were reviewed together as divulging the judge's overall reasoning and treatment of the panoply of constitutional issues. Judge Edward Devitt of the District of Minnesota initially upheld the Sentencing Commission and the Guidelines on July 27, 1988, ruling that the Commission was properly regarded as an independent commission in the judicial branch and holding that the presidential removal power did not intrude unconstitutionally upon the judiciary. See *United States v. Whitfield*, 689 F. Supp. 954, 956-57 (D. Minn. 1988). Two months later, on September 13, 1988, Judge Devitt reaffirmed his earlier ruling and supplemented his analysis, primarily by addressing (and rejecting) the government's argument that the Commission should be conceived as an executive branch agency. See *United States v. Roy*, 694 F. Supp. 635, 637-41 (D. Minn. 1988).

¹⁴⁶ For a discussion of the role of *en banc* district courts in the Sentencing Guidelines Crisis, see *infra* note 172.

¹⁴⁷ Questions of sampling and potential bias are avoided in this study because (with the qualifications mentioned in notes 141-45) we have evaluated the entire universe of judicial decisions on the constitutionality of the Sentencing Guidelines in 1988. While the 293 judges involved do not constitute the entire population of district judges, the inclusion of a judge within this universe of decisions was based on the presumably random factors of a particular criminal case being assigned to that judge and the defendant raising a challenge to the Sentencing Guidelines.

¹⁴⁸ See *United States v. Thomas*, 699 F. Supp. 147, 148 (W.D. Tenn. 1988) ("The same arguments are presented to each court, resulting in decisions for and against the guidelines on varying grounds."). As discussed earlier, the Department of Justice and the Sentencing

varying quality in legal work among the United States Attorneys' offices and between government and criminal defense counsel.¹⁴⁹ In sum, the problem of incomparability has been eliminated without sacrificing authenticity.

b. Deepening the Search: Analyzing the Content of Judicial Reasoning in Opinions. Of equal value, and to our knowledge without precedent in empirical research into judicial decisionmaking,¹⁵⁰ we had the opportunity to study legal reasoning in action through written opinions authored or joined by 188 judges, all resolving the same legal problem. Thus, we not only analyzed the outcomes of the Sentencing Guidelines decisions, but also investigated the reasoning in the large number of district court decisions that were reduced to writing. A more complete understanding of judicial behavior requires consideration of both the outcome and the means by which the judicial actor

Commission drafted model briefs to be presented to all district judges addressing challenges to the Sentencing Guidelines. See DOJ Model Brief, *supra* note 88; Sentencing Commission Model Brief, *supra* note 91. In addition, members of a team of attorneys from Main Justice in Washington, D.C., including one of the authors of this article, specially appeared to argue on behalf of the government in many of the cases in the district courts. Although the criminal defense bar did not present a single model brief, the cooperative efforts of two organizations ensured a fair degree of comparability in the legal work presented on behalf of defendants challenging the Guidelines. Public Citizen Litigation Group frequently appeared as counsel for defendants challenging the Guidelines. See, e.g., *United States v. Brodie*, 686 F. Supp. 941, 942 n.2 (D.D.C. 1988); *United States v. Ruiz-Villanueva*, 680 F. Supp. 1411, 1412 (S.D. Cal. 1988); see also Marcus, *supra* note 83, at 31 (reporting involvement of Public Citizen in challenges to Guidelines by criminal defendants). Alan Morrison of Public Citizen ultimately argued the case against the Guidelines before the Supreme Court in *Mistretta v. United States*, 488 U.S. 361, 362 (1989). The National Association of Criminal Defense Lawyers routinely submitted *amicus curiae* briefs attacking the Guidelines in these cases. See, e.g., *United States v. Swapp*, 695 F. Supp. 1140, 1149 (D. Utah 1988); *United States v. Macias-Pedroza*, 694 F. Supp. 1406, 1414 (D. Ariz. 1988) (*en banc*); *United States v. Weidner*, 692 F. Supp. 968, 970 (N.D. Ind. 1988); *United States v. Amesquita-Padilla*, 691 F. Supp. 277, 279 (W.D. Wash. 1988); *United States v. Bogle*, 689 F. Supp. 1121, 1124 (S.D. Fla. 1988) (*en banc*); *United States v. Perez*, 685 F. Supp. 990, 992 n.1 (W.D. Tex. 1988); see also Cohen, *supra* note 21, at 184 n.3 (referring to "significant amount of 'sharing' of legal briefs and arguments on both sides of the [Sentencing Guidelines] issue").

¹⁴⁹ See Posner, *What Do Judges Maximize*, *supra* note 52, at 26 ("[J]udicial outcomes reflect both the judges' preferences going in *and* the quality of the briefing and argument in particular cases.").

¹⁵⁰ For another, likewise unique, example of content analysis of opinions in an empirical study of judicial behavior and judge characteristics (in that case, gender), although involving comparison of a sample of opinions in different cases by appellate judges on panels with shifting membership, see Sue Davis, *Do Women Judges Speak "In a Different Voice?"*: Carol Gilligan, Feminist Legal Theory, and the Ninth Circuit, 8 *Wis. Women's L.J.* 143 (1992-1993). For an example of empirical study of the content of judicial opinions in another context, that of the evolution of a common law doctrine, see Morris, *supra* note 26.

reached that outcome.¹⁵¹ Toward that end, we employed a system of categorization and coding for statistical analysis that would allow consideration of the various reasoning approaches and constitutional theories that characterized Sentencing Guidelines decisions.

We could be criticized for our willingness to infer judicial reasoning from written opinions. We recognize that, as Frank Cross reports, “[l]egal realists and critical legal scholars have long maintained that opinions are post-facto rationalizations of results dictated by judicial ideology.”¹⁵² Edward Rubin states that, in writing an opinion, “the judge is not trying to recreate her actual thought patterns, but to justify her conclusion by showing that it proceeds from accepted sources by legitimate, properly argued steps.”¹⁵³ However, while a judicial opinion may not be a transcript of the judge’s stream of consciousness in reaching a conclusion, we do not share the cynical view that the judge’s construction of an opinion is wholly divorced from meaningful reasoning. Indeed, because any judge’s ruling remains tentative until reduced to writing and filed with the clerk of the court, the opinion-writing stage is a continuation of the decisionmaking process. Indeed, having observed the judicial process as clerks to federal judges, two of the authors can contribute further confirmation to the existing anecdotal evidence that judges sometimes find “that certain opinions simply ‘won’t write’: where, after initially making a decision, the judge finds herself unable to craft an opinion justifying that decision.”¹⁵⁴ As scholars in particular recognize, writing *is* thinking. Thus the drafting of an opinion may enforce, undermine, or modify an initial conclusion.¹⁵⁵

¹⁵¹ See Rowland & Carp, *supra* note 39, at 172 (encouraging revival of interest by empirical researchers in opinions as “judges’ codified explanation of their judgment protocols”); Davis, *supra* note 150, at 151-52 (explaining that study of hypothesized gender differences in judging “may not be readily quantifiable in terms of voting behavior” and must instead “focus at least as much on judges’ methods of reasoning as . . . on the way they vote”).

¹⁵² Cross, *supra* note 48, at 267.

¹⁵³ Edward L. Rubin, *The Concept of Law and the New Public Law Scholarship*, 89 Mich. L. Rev. 792, 801 (1991).

¹⁵⁴ Cross, *supra* note 48, at 270 (citing Frederick Schauer, *Giving Reasons*, 47 Stan. L. Rev. 633, 652 (1995)); see also Alvin B. Rubin, *Does Law Matter? A Judge’s Response to the Critical Legal Studies Movement*, 37 J. Legal Educ. 307, 311 (1987); Kathleen Waits, *Values, Intuitions, and Opinion Writing: The Judicial Process and State Court Jurisdiction*, 1983 U. Ill. L. Rev. 917, 931.

¹⁵⁵ Some might question our assumption that these written district court decisions reflect the reasoning of the judges themselves. Among federal appellate judges, informed commentators believe that few judges still write their own opinions. “[T]he tendency has been for more and more of the initial opinion-drafting responsibility to be delegated to law clerks, transforming the judge from a draftsman to an editor.” Richard A. Posner, *The Federal Courts* 141 (1996) [hereinafter Posner, *Federal Courts*]. However, in contrast to

Moreover, as Cross notes, “[e]ven if an opinion’s justifications are not an authentic replication of a judge’s reason for decision, the writing may still have practical significance The requirement of justification . . . may preclude certain rulings, which cannot be justified under the traditional legal model.”¹⁵⁶ Whether an opinion is viewed as a faithful record of judicial reasoning in action, as an exercise in post-hoc justification, or, as we believe, as having elements of both, the drafting judge’s choice of legal rationale, method of described reasoning, and style of analysis in the opinion—when contrasted with the choices of other judges writing about the identical legal problem—should teach us something significant about the judicial process. If opinions truly were nothing more than “a mode of couching the personal legislative preferences of unelected judges in the publicly venerated language of a judicial decree,”¹⁵⁷ then we might expect all opinions reaching the same result to be clothed in the same justificatory rhetoric, steering the same safe course to avoid the shoals of public criticism. Instead, as our study revealed, judges reaching the same outcome adopted different constitutional theories, manifested alternative styles of analysis, and applied different modes of legal reasoning.

c. The Strength and Weakness of Using a Single Legal Problem. Paradoxically, the strength of our study is also its major weakness. While we avoided the problems of incomparability and inauthenticity, we necessarily did so in the context of a single legal problem. Thus, another goal of social science research—reliability—is significantly impaired. The rich database of Sentencing Guidelines decisions remains available for further exploration by other researchers (and ourselves) in other directions or under different models. But it is only one matter and, at least at the moment, the

court of appeals judges who generally are obliged to render written decisions in appeals, district court judges produce a written ruling on a particular matter only when they so choose to record their opinions. Thus, we believe it is more likely that a district judge takes a personal interest and a hand in drafting on the special occasions in which an opinion is produced. Indeed, we believe this is particularly likely when the issue is one of great significance—such as the Sentencing Guidelines constitutionality issue—and the judge wishes to publicly participate in the legal debate. In any event, even when a judge delegates drafting responsibilities to a law clerk, the judge maintains control over the basic structure of the opinion and the grounds upon which the issue is resolved. As discussed below, see *infra* Part IV.B.2, we coded opinions primarily on the basis of the constitutional theories raised and resolved by each judge. Whether the judge acts as author or architect of the opinion, our coding should be adequate to uncover the judge’s underlying views.

¹⁵⁶ Cross, *supra* note 48, at 268.

¹⁵⁷ Anthony D’Amato, *Aspects of Deconstruction: Refuting Indeterminacy with One Bold Thought*, 85 Nw. U. L. Rev. 113, 118 (1990).

Sentencing Guidelines Crisis remains a unique and unparalleled episode in American legal history.

Two factors rebut the argument of atypicality. First, the case raises fundamental questions of constitutional law, especially separation of powers, that have engaged jurists since the founding of our constitutional republic. The Sentencing Guidelines Crisis did not involve a marginal set of issues, on the periphery of legal concern, but rather occupied the center stage of the legal system.¹⁵⁸ The continued attention of the Supreme Court to separation of powers concerns in recent terms strongly validates our selection of this subject matter as the basis for an empirical study of judicial decisionmaking.¹⁵⁹

Second, the Sentencing Guidelines themselves remain a source of legal tension in the criminal justice system. In the decade since the Supreme Court purportedly laid the constitutional validity of the Guidelines to rest in *Mistretta v. United States*,¹⁶⁰ controversy over the Guidelines continues to simmer.¹⁶¹ A leading federal judge has declared the Guidelines a "dismal failure,"¹⁶² characterizing them as "a Byzantine system of rules" that "ignore individual characteristics of defendants and sacrifice comprehensibility and common sense on the altar of pseudoscientific uniformity."¹⁶³ Surveys of federal district judges persistently have found a majority supporting elimination of

¹⁵⁸ See *supra* Part II.B.1-2.

¹⁵⁹ See, e.g., *Raines v. Byrd*, 117 S. Ct. 2312 (1997) (dismissing for lack of standing lawsuit brought by individual members of Congress challenging constitutionality of Line Item Veto Act on separation of powers grounds); *Clinton v. Jones*, 520 U.S. 681 (1997) (holding doctrine of separation of powers does not require federal courts to stay all private actions against president while in office); *Loving v. United States*, 517 U.S. 748 (1996) (holding that separation of powers principles do not preclude Congress from delegating its constitutional authority to president to define aggravating factors that permit imposition of statutory penalty of death in military capital cases).

¹⁶⁰ 488 U.S. 361 (1989).

¹⁶¹ For a recent description of the continued controversy over the Sentencing Guidelines, including the views of both critics and defenders of the system, see generally Mary Pat Flaherty & Joan Biskupic, *Justice by the Numbers* (pts. 1-5), Wash. Post, October 6, 1996, at A1, October 7, 1996, at A1, October 8, 1996, at A1, October 9, 1996, at A1, October 10, 1996, at A1. For scholarly treatment of the subject, see generally *Symposium on Federal Sentencing*, 66 S. Cal. L. Rev. 99 (1992).

¹⁶² Cabranes, *Dismal Failure*, *supra* note 80, at 2; see also Michael Tonry, *Sentencing Matters* 11 (1996) ("Few outside the federal [sentencing] commission would disagree that the federal guidelines have been a disaster.").

¹⁶³ José A. Cabranes, *Letter to the Editor: Incoherent Sentencing Guidelines*, *Wall St. J.*, Aug. 28, 1992, at A11 [hereinafter Cabranes, *Letter to Editor*]; see also Kate Stith & José A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 Nw. U. L. Rev. 1247, 1254 (1997) (decrying reduction of trial judges' sentencing discretion and substitution of "bureaucratic penalization" under Guidelines regime); Naftali Bendavid, *Breyer's Role as Sentencing Pioneer Still Rankles*, *Legal Times*, May 16, 1994, at 7 (quoting district Judge Jack Weinstein as saying that Guidelines "require, in the main, cruel imposition of excessive sentences and unnecessary micromanaging of sentencing").

the Sentencing Guidelines.¹⁶⁴ Defenders assert that the Guidelines are "on balance, a notable, albeit certainly imperfect, success," contending that the Guidelines wisely reduce and structure judicial discretion, improve predictability in sentencing, and impose appropriately stern punishment.¹⁶⁵

Indeed, even constitutional objections to the Guidelines have not faded away entirely: In a few recent decisions, courts have resurrected separation of powers and due process objections to the Guidelines.¹⁶⁶ Although these rulings were subsequently overturned, such

¹⁶⁴ See Don J. DeBenedictis, *The Verdict is In*, A.B.A. J., Oct. 1993, at 78-79 (finding majority of judges and equal number of federal judges supported "scrapping" the Guidelines); Henry J. Reske, *Judges Irked by Tough-on-Crime Laws*, A.B.A. J., Oct. 1994, at 18 (finding that more than 50% of district judges supported elimination of Sentencing Guidelines); see also Bendavid, *supra* note 163, at 7 (describing opposition of federal judges to Guidelines, even to point that "[m]any judges regard as a traitor any colleague who serves on the U.S. Sentencing Commission"). One federal judge resigned from the bench in protest of the Sentencing Guidelines, see *Criticizing Sentencing Rules, U.S. Judge Resigns*, N.Y. Times, Sept. 30, 1990, at A22, and two federal senior judges declared they would refuse to impose sentences in drug cases to avoid the Guidelines and mandatory minimum sentences, see DeBenedictis, *supra*, at 78.

¹⁶⁵ See Bowman, *Quality of Mercy*, *supra* note 72, at 680, 707-20, 748-49 (rebutting criticisms that Guidelines are too rigid); see also Theresa Walker Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals? An Empirical and Case Law Analysis*, 40 Emory L.J. 393, 444 (1991) (concluding, after statistical study of Guidelines sentences, "that the Guidelines generally are meeting their goal of reducing disparity," although "disparity persists on a more limited scale as a result of differing approaches to ambiguous Guidelines provisions"); Andrew J. Kleinfeld, *The Sentencing Guidelines Promote Truth and Justice*, 55 Fed. Probation 16 (1991) (supporting, as a federal court of appeals judge, the federal Sentencing Guidelines system); Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 Nw. U. L. Rev. 1342, 1343-44 (1997) (stating that, although Guidelines have produced structure that, "judging from the scholarly commentary, virtually everyone loves to hate," the system is "a significant advance in sentencing practice [that] is workable in the day-to-day administration of justice"); Thomas N. Whiteside, *The Reality of Federal Sentencing: Beyond the Criticism*, 91 Nw. U. L. Rev. 1574, 1581, 1598 (1997) ("The [Guidelines] system is rigid enough to demand compliance with congressional statutory mandates, complex enough to capture culpability in a multitude of criminal behaviors in consistent fashion, and flexible enough to consider significant individual characteristics when appropriate."); cf. Paul H. Robinson, *The Federal Sentencing Guidelines: Ten Years Later, An Introduction and Comments*, 91 Nw. U. L. Rev. 1231, 1235, 1241 (1997) (concluding that Sentencing Reform Act establishes "appropriate balance" between goal of consistency through system of Guidelines that all judges must work from and power of judges to depart from Guidelines in cases differing from the paradigm envisioned by applicable Guidelines, although criticizing Guidelines as promulgated because "the Commission did not deduce sentencing guidelines from principles of justice, or logical principles of any sort," but rather "based its sentences on mathematical averages of past practice of federal sentencing judges").

¹⁶⁶ As recently as 1994, a panel of the United States Court of Appeals for the Eleventh Circuit in an unpublished opinion questioned the dual role of one district judge as both a member of the Sentencing Commission and a sentencing judge. See Ira Bloom, *The Aftermath of *Mistretta*: The Demonstrated Incompatibility of the United States Sentencing Commission and Separation of Powers Principles*, 24 Am. J. Crim. L. 1, 2-3, 9-11 (1996) (discussing *United States v. McLellan*, 28 F.3d 117 (11th Cir. 1994) (unpublished table

episodes as well as continued scholarly attention¹⁶⁷ reveal a persistent constitutional disquiet about the Guidelines and the authoring Commission. If *Mistretta* laid constitutional objections to the Sentencing Guidelines to rest, it is a somewhat troubled sleep.

d. Federal District Judges as a Subject of Study. It also must be emphasized that this is a study of the district court, that is, federal trial judges. Using trial, rather than appellate, judges for a study of judicial resolution of a complex question of constitutional law may seem peculiar. But, while the primary task of trial judges is factfinding,¹⁶⁸ legal reasoning and interpretation of legal texts remains a vital part of the work of a federal district judge. Indeed, some researchers have concluded that the federal trial bench is a better-suited laboratory for study of judicial discretion than the federal appellate courts.¹⁶⁹ Federal district judges have “solo versus collective responsibility” for their

decision)); Ann Woolner, Sentencing Panel Hit Over Dual Role, *Legal Times*, March 20, 1995, at 2 (same). The panel hinted that the constitutional question was not closed, saying that the Supreme Court’s *Mistretta* decision “was decided . . . before the Commission’s practices and powers had been developed much.” Woolner, *supra*, at 2 (quoting *McLellan*) (ellipsis in original). In a subsequent published opinion, the Eleventh Circuit “emphatically disavow[ed]” adoption of the earlier panel’s suggestion of a general conflict for a judicial member of the Sentencing Commission, leaving the issue of recusal from sentencing duties for future resolution. *In re United States*, 60 F.3d 729, 731 n.2 (11th Cir. 1995); see also Ann Woolner, 11th Circuit Rebuffs Sentencing Challenge, *Legal Times*, July 31, 1995, at 8 (reporting on Eleventh Circuit’s ruling). With respect to the constitutionality of the Commission, the court stated that “[t]he *Mistretta* decision sweeps broadly, and if it is to be overruled, the Supreme Court itself will have to do it.” *In re United States*, 60 F.3d at 733 n.4.

In 1993, a district judge renewed the substantive due process line of attack upon the Sentencing Guidelines—which the Supreme Court had not addressed in its *Mistretta* opinion—by holding that the Guidelines unconstitutionally imposed a 30-year prison sentence on a drug dealer without allowing the judge to take into account the minor nature of prior convictions or extenuating circumstances. See *United States v. Spencer*, 817 F. Supp. 176, 181-84 (D.D.C. 1993), aff’d on other grounds, 25 F.3d 1105 (D.C. Cir. 1994); see also *United States v. Silverman*, 976 F.2d 1502, 1534-35 (6th Cir. 1992) (Martin, J., dissenting) (“I now . . . see the error of my early endorsement of the goals of the guidelines. . . . I now believe I was wrong in endorsing the guidelines [because they] have become more than just guidelines; they are rigid mandates [that] disregard fundamental notions of due process.”).

¹⁶⁷ For recent scholarly critiques of the Sentencing Guidelines on constitutional grounds—separation of powers and due process, see generally Bloom, *supra* note 166; Ronald J. Krotoszynski, Jr., *On the Danger of Wearing Two Hats: Mistretta and Morrison Revisited*, 38 *Wm. & Mary L. Rev.* 417 (1997); Jack H. McCall, Jr., *The Emperor’s New Clothes: Due Process Considerations Under the Federal Sentencing Guidelines*, 60 *Tenn. L. Rev.* 467 (1993).

¹⁶⁸ See Rowland & Carp, *supra* note 39, at 145.

¹⁶⁹ See Ashenfelter, Eisenberg & Schwab, *supra* note 27, at 263-64 (“On many issues . . . , district judge discretion governs . . . [and] in their isolation, district judges may feel less constrained by legal doctrine and thus be more likely to follow political inclinations”); see also Rowland & Carp, *supra* note 39, at vii (stating that political scientists have recognized that “federal trial courts [are] highly politicized policy-making institutions

decisions,¹⁷⁰ whereas the discretion of appellate judges is checked (although hardly eliminated) by group voting.¹⁷¹

The individual responsibility of federal district judges for their decisions is somewhat complicated in our study by the unusual manifestation of *en banc* district court proceedings resulting in collegial opinions.¹⁷² However, both their unfamiliarity with the constraints of collective decisionmaking and the propensity of the district judges to enter dissents and even special concurrences from these *en banc* opinions suggest that individual discretion was not muted much in these circumstances.¹⁷³ Nonetheless, we took the precaution of coding variables reflecting individual style or theory (originalism and practical versus theoretical) only for judges who personally authored opinions; judges who merely joined an opinion were coded only on the substantive constitutional grounds that were the basis for the opinion joined (separation of powers, nondelegation doctrine, or due process).

and . . . trial judges, like their appellate counterparts, [are] influenced by their personal values and policy preferences".

¹⁷⁰ Howard, *supra* note 30, at 135.

¹⁷¹ See *id.* at 178-221; Ashenfelter, Eisenberg & Schwab, *supra* note 27, at 263-64 ("Appellate judges decide cases in panels of three or more. Multiple decision makers may check judicial discretion. If one's fellow judges evaluate the legal arguments a certain way, concern for collegiality and respect pushes one to conform to these views . . .").

¹⁷² See Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limitations on the Discretion of Sentencers*, 101 Yale L.J. 1681, 1719 (1992) (describing how, during 1988, "[s]ome district courts held unprecedented *en banc* hearings to receive arguments from the Department of Justice and the Commission . . . and from defense attorneys"). In our study, 90 of the 293 judges participated in *en banc* decisions. The *en banc* proceedings by district court judges were themselves unusual, interesting, and arguably unauthorized. While the efficiency of a single proceeding is clear, the validity of a district judge's compliance with an *en banc* order with which he disagrees is not. Some of these purported *en banc* proceedings were nothing more than joint hearings of argument in which the participating judges reserved the right to determine whether to join the *en banc* opinion and follow that ruling in future cases. However, in some districts, the judges agreed in advance to adopt the ruling of the majority on the constitutionality of the Guidelines, even if one or more judges dissented. See, e.g., *United States v. Ortega Lopez*, 684 F. Supp. 1506, 1515 (C.D. Cal. 1988) (*en banc*) ("This decision is binding upon the members of this Court in all relevant cases unless and until we receive a contrary ruling from the Ninth Circuit or the Supreme Court."). Since there is no general statutory authorization for federal trial judges to reach decisions as panels and apply those decisions as mandatory precedent for all judges in the district, the validity and merit of these *en banc* proceedings warrant further examination.

¹⁷³ See, e.g., *United States v. Macias-Pedroza*, 694 F. Supp. 1406, 1419 (D. Ariz. 1988) (*en banc*) (Carroll, J., concurring in part); *id.* at 1419 (Rosenblatt, J., dissenting); *United States v. Bogle*, 689 F. Supp. 1121, 1161 (S.D. Fla. 1988) (*en banc*) (Aronovitz, J., specially concurring); *id.* at 1163 (Gonzalez, J., dissenting); *id.* at 1164 (Nesbitt, J., dissenting); *Ortega Lopez*, 684 F. Supp. at 1515 (Hupp, J., dissenting).

III THE INDEPENDENT VARIABLES¹⁷⁴

We obtained background information on judges from several sources, including standard biographies on federal judges,¹⁷⁵ independent research into the records of Senate judicial confirmation hearings at the National Archives, surveys of federal judges on certain subjects where the information was uncertain, and the generosity of other researchers.¹⁷⁶ When special sources of information were used, these sources are identified below in a description of the variables.

A. Demographic Variables

SEX—For each judge, SEX is coded as “1” for Female and “0” for Male.

RACE—For each judge, RACE is coded as “1” for racial or ethnic minority and “0” for white, non-Hispanic.¹⁷⁷ Although this data was initially recorded by each individual ethnic or racial group, the small numbers of nonwhite judges in each discrete category precluded separate classification.

CRIME-RATE—The Federal Bureau of Investigation (FBI) collects information on crime rates through the Uniform Crime Reporting program, a nationwide effort of city, county, and state law enforcement agencies voluntarily reporting data on crimes brought to their attention.¹⁷⁸ Our CRIME-RATE variable is based on the total crime index by state,¹⁷⁹ which provides the crime rate per 100,000 in-

¹⁷⁴ This part of the Article describes how we translated the information on each independent variable into a format suitable for statistical analysis. Discussion of the theoretical basis for study of the particular variable, relevant prior research findings on that variable or type of variable, and an interpretation of the findings in this study are provided in Part V of this Article.

¹⁷⁵ Sources checked include various editions of: *Almanac of the Federal Judiciary*; *The American Bench*; *Who's Who in American Law*.

¹⁷⁶ In particular, Sheldon Goldman generously shared information on each judge's racial background and American Bar Association rating.

¹⁷⁷ 28 minority judges were included in our dataset, 10 appointed by Republican presidents and 18 appointed by Democratic presidents.

¹⁷⁸ See Federal Bureau of Investigation, U.S. Dep't of Justice, *Crime in the United States: Uniform Crime Reports for the United States 1988*, at 1-6 (1989). Although Congress directed federal law enforcement agencies to participate in this program, implementation at the federal level had not yet occurred in 1988, the subject date for this study. See *id.* at 6.

¹⁷⁹ We had initially hoped to use a crime index for each of the nation's metropolitan statistical areas, believing this would be the best measure of the level of criminal activity in the area surrounding each judge's courthouse. (The crime index for metropolitan statistical areas is reported in Appendix IV of the 1989 report. See *id.* at 324-50.) Unfortunately, data were missing for a large number of the judges because no crime rates were included for Illinois cities as its reporting methods did not comport with FBI standards, see *id.* at 350

habitants.¹⁸⁰ The crime index includes the violent crimes of murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault, and the property crimes of burglary, larceny-theft, motor vehicle theft, and arson.¹⁸¹

LAW-SCHOOL—For each judge, attendance at an “Elite Law School” was coded as “1,” and attendance at a “Non-Elite Law School” as “0”.¹⁸² For the study, we denominated the following seven law schools as “Elite”: Chicago, Columbia, Harvard, Michigan, Stanford, Virginia, and Yale. Although any classification of law schools by prestige is unavoidably subjective, we attempted to add some objectivity by synthesizing rankings in the *Chicago-Kent Law Review*’s list of the schools with the most prolific (publishing) faculty,¹⁸³ the *U.S. News & World Report* ranking,¹⁸⁴ and the *Gourman Report* ranking,¹⁸⁵ thereby including measures of faculty activity, popular reputation, and other factors in evaluating status.¹⁸⁶ In addition, we

n.4, no report was made for Florida, see *id.* at 350 n.5, and several judges did not maintain their chambers in metropolitan statistical areas for which crime rates are calculated. Crime rate data by metropolitan statistical area were missing for 61 of the 291 judges in the largest regression analysis, which we regarded as an unacceptable number of missing cases. However, we did prepare an alternative regression analysis using the crime rate by metropolitan statistical area for the 241 judges for whom data was available. This analysis produced no significant findings with respect to crime rate influence. The documentation for this alternative analysis is available from the authors.

¹⁸⁰ The crime index by state is reported in Table 5 of the 1989 FBI report. See *id.* at 60-70. Although the Illinois report did not comply with FBI guidelines and no report was made by Florida, the FBI provided estimated crime counts at the state level. See *id.* at 70 nn.5-6.

¹⁸¹ See *id.* at 320.

¹⁸² Judges were coded according to the law school from which they received their first legal degree, thus we did not consider advanced legal degrees. Our theory is that the primary socializing effect of legal education is felt during the basic three-year experience leading to the initial legal degree.

¹⁸³ See, e.g., James Lindgren & Daniel Seltzer, *The Most Prolific Law Professors and Faculties*, 71 *Chi.-Kent L. Rev.* 781, 793-94 (1996).

¹⁸⁴ See, e.g., *The Top 25 Law Schools*, *U.S. News & World Report*, Mar. 1996, at 82.

¹⁸⁵ See, e.g., Jack Gourman, *The Gourman Report: A Rating of Graduate and Professional Programs in American and International Universities* 90-91 (8th ed. 1997).

¹⁸⁶ We adopted the following formula: Using the three most recent rankings from each of the three sources, we set up two sets for scoring, one based on position in the top five and one based on position in the top ten. Then, we assigned one point to each law school for each time it is listed in the top five or the top ten of these rankings. Accordingly, we created a total of nine lists (three for each year, thus making 9 points the maximum score), and each source was given equal weight. Based upon listings among the top five law schools, we found that four schools stood out: Chicago (9), Yale (9), Harvard (8), and Stanford (5). See also Ashenfelter, Eisenberg & Schwab, *supra* note 27, at 274 n.44 (classifying these four as elite law schools for empirical study of judicial decisionmaking). Looking at listings among the top ten law schools, we added Columbia (9) and Michigan (7) to the list; both schools also had ranked just after Stanford in the top five listings. Two very recent entries into the surveys of law schools, both based upon scholarly productivity and impact, confirm our choice of elite law schools. First, one professor has assembled a rank-

developed a separate ranking based upon the number of federal judges in our study who graduated from a law school and who were appointed to a district court outside the state where the law school is located. Under this rough estimate of which law schools have a national rather than regional character, one additional school—Virginia—was distinctive in the large number of federal judges for whom it was alma mater and thus was added to our select list of elite law schools.¹⁸⁷

B. Political Variable

PARTY—For each judge, appointment by a Republican president is coded as “1,” and by a Democratic president as “0”. In addition, although not included in the standard set of variables, dummy variables were also created for each individual president, with the exceptions of Truman, Eisenhower, and Kennedy. These three were combined because the number of judges in our study who were appointed by those presidents was so small.

ing of law schools that emphasizes the scholarly distinction of a school's faculty, measured by the volume of publication and citations to publications. See David E. Rovella, *A Survey of Surveys Ranks the Top U.S. Law Schools*, *Nat'l L.J.*, June 2, 1997, at A1 (discussing the “Ranking of U.S. Law Schools by Educational Quality” produced by Professor Brian Leiter of University of Texas School of Law). Of the seven law schools designated as “elite” for our study, six fall within this new survey’s top six law schools, with our seventh “elite” school, Michigan, being ranked tenth in the new survey. See *id.* Second, Professors Theodore Eisenberg and Martin T. Wells measured the academic reputations of 32 law schools by citations to their faculties’ works. See generally Theodore Eisenberg & Martin T. Wells, *Ranking and Explaining the Scholarly Impact of Law Schools*, 27 *J. Legal Stud.* 373 (1998). Their study identified Yale, Chicago, Harvard, and Stanford as standing alone at the top of the ranking for scholarly impact. See *id.* at 374.

In developing a list of elite law schools for federal judges, one would ideally use a historical classification, that is, the ranking of the school at the time that a particular judge attended law school and began his or her legal socialization. Unfortunately, such an effort to create historical rankings would likely prove impossible and would certainly be unduly burdensome, both because of the difficulty of remeasuring the ranking, judge-by-judge, year-by-year, and because the sources we relied upon for law school rankings did not exist during those periods. Accordingly, we began with current rankings (1995-97) to create our list. Because status as an elite law school depends primarily upon reputation, a characteristic that develops over substantial periods of time and changes slowly, these rankings should be roughly accurate. Moreover, as noted *infra* note 187 and the accompanying text, we supplemented and confirmed this process with a separate ranking based on the number of federal judges who graduated from a particular law school, thus distinguishing “national” from “regional” law schools. This latter ranking should correspond with historical reputation at the relevant point in time.

¹⁸⁷ Virginia (11) was second only to Harvard (25) in the number of out-of-state graduates represented among the federal judges in our sample, and ranked well above Michigan (7), Yale (6), Columbia (3), Stanford (3), and Chicago (2).

C. Prior Employment Variables

PROSECUTOR—For each judge, prior employment as a criminal prosecutor is coded as “1,” and the absence of such experience as “0”.¹⁸⁸ Because standard biographical listings were not always dispositive in verifying whether a position involved prosecutorial duties,¹⁸⁹ we also consulted other biographical sources and Senate confirmation hearings. In cases of continuing uncertainty, we sent survey letters to the judges.¹⁹⁰

DEFENSE—For each judge, prior legal practice as a criminal defense lawyer is coded as “1,” and the absence of such experience as “0”. Unfortunately, criminal defense experience was difficult to glean from the traditional biographical sources, as a judge’s prior position with a law firm may or may not have involved criminal defense work. Criminal defense experience was recorded only if there was a clear indication in biographical information to that effect. In addition, when we surveyed certain judges to confirm criminal prosecution experience, we asked on the same form for any criminal defense experience, which allowed us to positively code several more judges. Although our coding undoubtedly understates the number of judges with some criminal defense background, we have a high degree of confidence that those so coded did have the experience.¹⁹¹

MILITARY—For each judge, military service is coded as “1,” and the absence of such service as “0”.

LAW-PROF—For each judge, prior employment as a law professor is coded as “1,” and the absence of such employment as “0”. We included only full-time members of a law school faculty, indicated by

¹⁸⁸ We included in this category those who had prosecution experience at the state or federal level, those who acted as prosecutors in the Judge Advocate General (JAG) Corps of a military service branch, and those who had served as agents of the Federal Bureau of Investigation.

¹⁸⁹ For example, while the listing of a judge’s previous position as an Assistant United States Attorney (AUSA) likely reflects criminal prosecution experience, some AUSAs handle civil litigation against the federal government. Based on the responses we obtained to our survey, we determined that this was the one position that we could safely treat as a proxy for criminal prosecution; the few judges who had been AUSAs in a noncriminal capacity were so designated in biographies.

¹⁹⁰ Of the 34 surveyed judges, we received responses from 30, a return rate of nearly 90%. The surveys were sent to all judges whose biographies listed service as an AUSA without additional information confirming criminal prosecution (as to whom the returned surveys uniformly confirmed prosecutorial duties), service in the military JAG Corps, or municipal or county official positions whose description was unclear. With the exception of AUSAs, from whom the survey response was uniform, thus justifying treatment of that service as a proxy for prosecution, judges who did not respond to the survey or, in the case of one judge who was deceased, were coded as nonprosecutors.

¹⁹¹ Of the 293 judges in our study, 39 are coded as having criminal defense experience. See *infra* Table 3.

both rank (professor, associate professor, or assistant professor) and by absence of other apparent full-time employment during the same time period.

POLITICAL—For each judge, prior political experience was coded as “1,” and the absence of such as “0.”¹⁹² For this variable, we included judges who had held state or federal elective office, other than elected judgeship, or appointment to a high-level administrative position at the state or federal level.¹⁹³ For purposes of classifying an administrative office as high-level, we included the selected state administrative offices listed by the Council of State Governments in *The Book of the States*¹⁹⁴ and federal administrative positions that were subject to Senate confirmation.¹⁹⁵

JUDGE—For each judge, we coded prior service as a state or local judge as “1,” and the absence of such as “0.”¹⁹⁶

D. Judicial Role or Institutional Variables

ABA-AQ/ABA-BQ—The American Bar Association’s Standing Committee on the Federal Judiciary evaluates the qualifications of persons considered for appointment to the federal courts.¹⁹⁷ At the time of the appointment of the judges included in this study,¹⁹⁸ the

¹⁹² We also created alternative variables ELECTED (consisting of state and federal elected positions), APPOINTED (consisting of high-level appointed administrative positions in state and federal government), EXECUTIVE (consisting of elected or appointed high-level administrative positions in both state and federal government), and LEGISLATIVE (consisting of members of Congress or a state legislature). For these alternative variables, judges who had experience at both the executive and legislative level were coded for both EXECUTIVE and LEGISLATIVE, and judges who had held both ELECTED and APPOINTED office were coded for both.

¹⁹³ See Aliotta, *supra* note 39, at 279 (describing similar variable for study of judicial decisionmaking). For determining which state offices were elective (other than service as legislator, which was presumed elective), we referred to Table 2.9 in Council of State Governments, 31 *The Book of the States* 33-34 (1996-97).

¹⁹⁴ Council of State Governments, *supra* note 193, at 35-39 (Table 2.10).

¹⁹⁵ For a list of leading administrative and independent agency positions and the type of appointment, see generally Senate Comm. on Govt. Affairs, 102d Cong., 2d Sess., *Policy and Supporting Positions* (Comm. Print 1992). For information on type of appointment for the defunct Civil Aeronautics Board, we referred to House Comm. on Post Office and Civil Service, 94th Cong., 2d Sess., *Policy and Supporting Positions* (Comm. Print 1976).

¹⁹⁶ This category thus includes state, county, and municipal judgeships, but not federal adjunct judicial positions such as bankruptcy judge or magistrate.

¹⁹⁷ For a description of the Standing Committee and its rating of potential nominees for federal judgeships, see *Public Citizen v. United States Dep’t of Justice*, 491 U.S. 440, 443-45 (1989).

¹⁹⁸ The Standing Committee has since modified its rating of prospective nominees to eliminate the “Exceptionally Well Qualified” rating, thus leaving three possible ratings, “Well Qualified,” “Qualified,” or “Not Qualified.” See American Bar Association, *The ABA Standing Committee on Federal Judiciary: What It Is and How It Works* 7 (1991) (explaining three possible ratings of prospective judicial nominees).

Committee rated prospective nominees on the following scale: "Exceptionally Well Qualified," "Well Qualified," "Qualified," and "Not Qualified."¹⁹⁹ In addition, if a minority of the Standing Committee rates the prospective nominee differently, that minority conclusion is reported as a "split rating." For example, a "split rating" of Qualified/Not Qualified means that a majority or substantial majority of the committee votes a Qualified designation but one or more members dissent and vote Not Qualified."²⁰⁰

For coding purposes, we created three dummy variables: (1) ABA-AQ, which consists of those judges receiving either of the two above qualified ratings, i.e., Exceptionally Well Qualified and Well Qualified; (2) ABA-Q, which was the reference variable and consists of those judges who were rated Qualified; and (3) ABA-BQ, which consists of those judges receiving a below qualified rating of either Not Qualified or the split rating of Qualified/Not Qualified.²⁰¹

CASELOAD—The *Annual Report of the Director of the Administrative Office of the United States Courts* provides statistics on workload in each of the district courts.²⁰² For our study, we used the civil and criminal filings per district court judge for each individual federal district as reported for the twelve month period ending June 30, 1989.²⁰³ These filings are weighted based upon a time study conducted by the Federal Judicial Center concerning the time required by a judge for a particular type of case.²⁰⁴ The CASELOAD variable included in our standard set consists of the combined civil and criminal filings.

¹⁹⁹ See, e.g., American Bar Association, Standing Committee on Federal Judiciary: *What It Is and How It Works* 4 (1983) (briefly describing each rating); American Bar Association, Standing Committee on Federal Judiciary: *What It Is and How It Works* 4-5 (1980) (same); American Bar Association, The ABA's Standing Committee on Federal Judiciary: *What It Is and How It Works* 9-10 (1977) (same).

²⁰⁰ Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 *Judicature* 318, 320 (1989) (italics omitted).

²⁰¹ A "split rating" reflected a division on the committee between any two ratings, and the dissenting minority may have believed the prospective nominee deserved a higher, as opposed to a lower, rating than did the majority. For purposes of this study, we have only recorded split ratings when the Standing Committee divided between "Qualified" and "Not Qualified" (recorded for this study as "Q/NQ"). As Sheldon Goldman explains: "The ABA committee insists that anyone receiving a *Qualified* rating, even if there is dissent among some members, is fully qualified for the federal bench. Yet there is the suspicion that those receiving this split rating are only marginally qualified." *Id.* at 320.

²⁰² See *Annual Report of the Director of the Administrative Office of the United States Courts* (1989) [hereinafter *Annual Report of Admin. Office*].

²⁰³ See *id.* at 456-57 tbl.X-1; see also Cohen, *supra* note 21, at 192 n.21 (using same source for measuring caseload in study of Sentencing Guidelines constitutionality decisions).

²⁰⁴ See *Annual Report of Admin. Office*, *supra* note 202, at 457 n.1.

For several alternative regression analyses, reported in two of the tables set out below, we also created a CRIM-CASELOAD variable that is a ratio of the criminal filings to the overall caseload per judge in that district, thus measuring the relative portion of the judge's overall docket that consists of criminal cases.

SENIORITY—The factor of seniority on the federal bench has been coded by number of months from date of appointment²⁰⁵ to the date of the judge's Sentencing Guidelines decision.²⁰⁶

E. Promotion Potential

In his landmark work on the economic influences upon judicial behavior in the context of the Sentencing Guidelines constitutionality decisions, Mark Cohen hypothesized that a judge's behavior is influenced by the possibility of being promoted from district court to the court of appeals.²⁰⁷ He identified three variables to measure the likelihood that any one district judge may soon be positioned for elevation to the appellate court—the ratio of district court judgeships to court of appeals judgeships in that state, the existence of current vacancies in the court of appeals, and the age of the oldest active circuit judge from that state.²⁰⁸ To combine these three variables into a single promotion potential score, Cohen used a factor analysis to create a proxy variable.²⁰⁹

²⁰⁵ The source for the appointment date is Volume 700 of the Federal Supplement. This volume, which is dated early in 1989, lists those judges on the bench as of the end of 1988, including the date of appointment for each judge.

²⁰⁶ For nine judges, the Sentencing Commission had information concerning how each judge had ruled upon the Guidelines but had no date for the decisions. Because these did not involve written decisions, there was no way to recover this information. Rather than lose nine judges as missing cases in our regression analyses, we adopted an estimated date of decision, choosing the mid-year date of June 30, 1988 as the default. Because all of the Sentencing Guidelines constitutionality decisions occurred during an eleven-month period during 1988, our estimated date is off, at most, by five-and-a-half months. Moreover, since most of the decisions cluster around the middle of the year, it is likely that the deviation from the estimated June 30 date is smaller. Compared to a mean seniority figure of 113.12 months, see *infra* Table 2, we believed this estimation was acceptable and preferable to the alternative of excluding nine judges for whom we had otherwise complete data. In any event, as a check, we ran an alternative regression analysis in which these nine judges were excluded, with no effect on the correlation for SENIORITY. In addition, not having participated in written opinions, these nine judges are necessarily excluded from all analyses involving dependent variables, other than the basic outcome variable reported in Table 4.

²⁰⁷ See Cohen, *supra* note 21, at 188-89.

²⁰⁸ See *id.* at 192.

²⁰⁹ See *id.* at 193. Subsequently, in a study of federal district judge behavior in the context of criminal antitrust sanctions, Cohen developed a more sophisticated set of eight different variables to measure promotion potential. See Mark A. Cohen, *The Motives of Judges: Empirical Evidence from Antitrust Sentencing*, 12 *Int'l Rev. L. & Econ.* 13, 19, 27-29 (1992). Some of these variables reflect the longitudinal nature of that study, such as the

Following Cohen's pioneering work, we adopted the same three variables and performed a factor analysis to create a proxy variable (PROMO-POT). However, because Cohen's article does not provide a complete description of his three variables and because we made some different choices in measuring these variables, our implementation may differ in the details and should be described.

Ratio of Circuit Court Judgeships to District Court Judges in Each State. This ratio reflects the number of district court positions authorized for the judge's state²¹⁰ per number of circuit court positions normally reserved for that state. Because court of appeals judgeships are not officially designated as located within a particular state, it was necessary to determine which active judges (and, for vacant positions, recently retired or deceased judges) had maintained chambers in the state;²¹¹ this number is fluid and changes as new judges are confirmed and determine whether to locate their chambers in the same state as the judge they replaced.²¹²

availability of newly created court positions over time, that are not relevant to our fixed-time study. See *id.* Another variable—the age and length of a subject judge's judicial service, which theoretically may either enhance or decrease a judge's promotion potential or responsiveness to that influence in decisionmaking—did not prove useful in that study. See *id.* at 23. Cohen also introduced variables taking into account the party affiliation of the judge and the party of the President at the time of a vacancy. See *id.* at 27-29. We have controlled for political party somewhat differently in our study by conducting alternative regression analyses that select only for judges appointed by Republican or Democratic Presidents. In the final analysis, we adhered to the simpler promotion potential scheme in Cohen's earlier study as better suited for our study and also as allowing more direct comparison of his results with ours.

²¹⁰ The number of district court positions authorized for a state was taken from Table X-1 of the Annual Report of the Director of the Administrative Office of the United States Courts covering the 1988 period. See Annual Report of Admin. Office, *supra* note 202, at 456-57.

²¹¹ This determination was a two-step process: First, we identified all active circuit judges listed in volume 700 of West's Federal Supplement reporter of decisions. Based on the state in which each such active judge had his or her chambers, that circuit court judgeship was treated as reserved to that state. (The assumption is that any vacancy in that judgeship will be filled by a nominee from that state, although this is not invariably the case.) Second, because there were unfilled vacancies in the circuit courts at the end of 1988, the listing of active judges in volume 700 of the Federal Supplement is not a complete listing of all authorized circuit court judgeships and the states from which they are normally appointed. To finalize the list, we also examined each court of appeals vacancy listed in the December 1988 release of "Vacancies in the Federal Judiciary" published by the Administrative Office of the Courts. For each such vacancy listed, we looked at earlier volumes of the Federal Supplement to determine where that judge had his or her chambers when still sitting as an active judge.

²¹² For example, determination of the number of circuit judge positions treated as reserved for California changed during 1988. Judge Joseph Sneed, who had his chambers in California, retired in 1987. His successor was Judge Stephen Trott, who was confirmed on March 25, 1988, but who set up his chambers in Idaho. Thus, the Sneed/Trott position was counted as a California position prior to March 25, 1988, but counted as an Idaho position

Current Vacancies. For each district court judge, we determined whether there was a current vacancy in one of the circuit court judgeships normally reserved for that state at the time of the judge's decision on the validity of the Guidelines.²¹³ This component factor was recorded as one of three possibilities or a combination thereof: (1) "No Vacancy" if there was no vacancy listed that month in a circuit court judgeship normally reserved for that state; (2) "Vacancy-Nominee" if there was a vacancy listed that month in a circuit court judgeship normally reserved for that state *and* if there was also a nominee for that judgeship submitted by the President to the Senate before the date of the district judge's Guidelines decision;²¹⁴ or (3) "Vacancy" if there was a vacancy listed that month in a circuit court judgeship normally reserved for that state *and* if there was no nominee listed for that judgeship. For some states, there was more than one vacancy in court of appeals judgeships normally reserved for that state, and those vacancies might be with or without nominees.

To implement this component factor, we assigned weights to each of the three possibilities: (1) "0" for "No Vacancy," (2) "0.5" for "Vacancy-Nominee," and (2) "1.0" for "Vacancy." For example, if, as was true for California at one point during 1988, there were two vacancies with nominees and one vacancy without a nominee, the vacancy score was 2.0. As noted, we treated a vacancy without a nominee as a fully open position, while a vacancy with a nominee was

after that date. Thus, for the few California decisions dated prior to March 25, 1988, the ratio was 16/47 (0.34), but after that date was reduced to 15/47 (0.32), reflecting competition over fewer circuit seats reserved for that state.

²¹³ Existence of a vacancy was determined by use of the "Vacancies in the Federal Judiciary" mimeographs from the Administrative Office of the United States Courts from 1988. For each district judge, we looked at the edition of "Vacancies in the Federal Judiciary" dated at the beginning of the month following the month in which the judge's decision on the Guidelines was rendered (i.e., if the decision upholding or invalidating the Guidelines is dated in June, 1988, then we looked to the July 1 edition of "Vacancies in the Federal Judiciary"). If a vacancy appeared on the court of appeals for the circuit in which that district judge sat, then we determined from which state the court of appeals judge who created the vacancy came (that is, we determined whether the vacancy was in a circuit court judgeship that was normally reserved for the state in which the district court judge sits). In addition, to prevent double-counting of the same circuit court judge for both a vacancy and the age of the oldest circuit judge, the judgeship was recorded as vacant only if the circuit judge was listed as retired or declaring an intention to retire by the date of the particular district judge's Sentencing Guidelines decision. If the judgeship was listed as vacant on that date, then that retiring circuit judge was not considered in terms of age of the oldest circuit judge. Thus, there is no overlap between the vacancy factor and the age of the oldest circuit judge factor.

²¹⁴ Thus, in addition to identifying the existence of a nominee for the position, we noted also the actual date of the nomination and determined whether that nomination predated the date of the district court decision (if the nomination was made after that date, then we recorded this factor as a "Vacancy").

effectively treated as half-open, half-closed. Because 1988 was a presidential election year, and a change of parties in the White House would obviously result in withdrawal of all pending nominations, and because a nomination is not a guarantee of confirmation (indeed, several pending nominations were withdrawn during the course of the year), the fact of nomination did not necessarily mean that the vacancy would be filled.

Age of Oldest Active Circuit Judge. The final promotion potential factor is the age of the oldest active appeals court judge from the district judge's state.²¹⁵ As Cohen observes, "[i]n general, the older the current appeals court judge, the sooner the next vacancy will appear."²¹⁶

Factor Score. We hypothesize that these three observed variables are linear combinations of an underlying and unobserved factor, specifically a judge's potential for promotion.²¹⁷ Each of the three observed variables was calculated so that its increase would suggest an increase in a judge's potential for promotion. We performed a factor analysis, whereby a promotion potential factor score was estimated,²¹⁸ and we included this estimation in our standard set of variables.

In his study, Cohen excluded senior judges and judges from the District of Columbia district court,²¹⁹ on the presumable basis that

²¹⁵ To determine this factor, we first determined who were the active court of appeals judges holding circuit court judgeships normally reserved for that district judge's state at the time of the district judge's decision. This required several steps: First, by looking at volume 700 of the Federal Supplement, we identified the active circuit judges with chambers in that state (that is, active judges in circuit court judgeships normally reserved for that state) as of the end of 1988. Second, we also reviewed earlier and subsequent volumes of the Federal Supplement to ensure that no recently retired or retiring judges were omitted and that all active or retiring circuit judges during this period were accounted for under either the age of oldest circuit judge factor or the vacancy factor. Third, we eliminated those judges whose appointments were dated after the date of the district court's decision on the Guidelines. (These judges thus would not have been sitting at the time the district judge made the decision). Fourth, we looked at the "Vacancies in the Federal Judiciary" for the month following the district court decision. If there was a vacancy listed for a court of appeals judgeship normally reserved for that state, we looked at the date the vacancy was created to determine whether the judge would have been an active court of appeals judge at the time of the district court decision. If so, that judge was added to the list. Finally, for each of those court of appeals judges who were active at the time of the district court decision and who had chambers in that state, we determined the date of birth. We recorded the age of the oldest active circuit judge in a judgeship in that state by a whole number for number of years. For convenience, we simply subtracted the year of birth from the year 1988 (i.e., for a birthdate of 1946, the number to be recorded would be 42).

²¹⁶ Cohen, *supra* note 21, at 192.

²¹⁷ See Jae-On Kim & Charles W. Mueller, *Factor Analysis: Statistical Methods and Practical Issues* 8 (1978) (describing factor analysis assumption that "observed variables are linear combinations of some underlying (hypothetical or unobservable) factors").

²¹⁸ See Cohen, *supra* note 21, at 193.

²¹⁹ See *id.* at 190.

these judges were effectively ineligible for and thus unlikely to be motivated by promotion to the court of appeals. Although we agree with the presumption, we did not exclude them from the study.²²⁰ Precisely because these judges are least likely to be influenced by the possibility of promotion, they should be retained in the study as a point of comparison.²²¹ Accordingly, we assigned the lowest promotion potential factor score derived to these judges, rounding slightly downward.²²²

F. Precedent

We created a variable measuring the strength of persuasive precedent in the form of rulings by other district judges for or against the validity of the Guidelines during the Sentencing Guidelines Crisis. We settled upon a measure of the persuasive precedent available within the same circuit, reflecting our hypothesis that judges will be more aware of and more influenced by their closer neighbors' rulings.²²³ Using a chronological chart of district judge rulings, this

²²⁰ As noted earlier, see *supra* note 206, the Sentencing Commission lacked information on the date of decision for nine judges. Rather than lose nine judges as missing cases in our regression analyses, we adopted an estimated date of decision—choosing the mid-year date of June 30, 1988 as the default. Theoretically, this selected date was relevant not only to seniority but also to whether there were court of appeals vacancies at the crucial point of the district judge's decision. Fortunately, this theoretical concern was not borne out in practice. For four of the judges, there were no vacancies in their circuits all year. For four other judges from the same state, the vacancy situation was stable through most of the year and changed only at a late point after which no other district judge in that circuit issued a Sentencing Guidelines opinion, thus leading us to believe it is most unlikely that our default date (which precedes the date of change) affects the calculation. For the single remaining district judge, the only change during the year was from a vacancy to a vacancy with a nominee. This judge was coded more conservatively as seeing a single vacancy with a nominee. In any event, we also conducted an alternative regression analysis on the outcome dependent variable excluding these nine judges with no effect on the PROMO-POT variable's significance.

²²¹ For purposes of this study, we used volume 700 of the Federal Supplement to determine if the judge was listed as active or senior as of the end of 1988. To some extent, the list of senior judges determined in this manner will be overinclusive, as some judges may have been active as of the time of a decision on the Guidelines earlier in the year and then changed to senior status later in the year. However, this overinclusiveness is actually a more accurate measure for our purposes. We essentially are using senior status as a control for promotion potential, recognizing that senior status judges certainly will not be candidates for nor motivated by the possibility of promotion to the court of appeals. This same analysis applies directly to judges, who while active at the time of a decision, were plainly contemplating an imminent change in status as demonstrated by their transfer to senior status by the end of the year.

²²² The lowest promotion potential factor score derived was -2.17 and the highest 2.94, with a mean of -.39. We assigned a score of -2.20 to senior and District of Columbia judges.

²²³ Believing that judges would be most influenced by and aware of other decisions within their own district, we initially created a "Within District Precedent" variable based upon a chronological chart of decisions by district. Unfortunately, this variable was flawed

PREC-CIR (precedent within a circuit) variable is coded by subtracting the number of prior²²⁴ judges²²⁵ within each circuit finding the Guidelines unconstitutional from the number finding them constitutional, multiplying that by the absolute value of the difference, and dividing the result by the total number of decisions within the circuit. Using the absolute value preserved the sign of the result,²²⁶ and including the total number of decisions as the denominator distinguished between situations where a single prior opinion existed and

because of lack of variation. A solid majority of the judges had no prior rulings by other judges in their district, because judges in many districts issued or joined rulings simultaneously with other judges in the district, several judges were the only ruling judges in their particular district, and, of course, every district had to have an initial ruling by a judge. Accordingly, after preliminary tests, we abandoned this variable. An attempt to analyze this variable by excluding all judges for whom there was no prior Guidelines ruling in the district was unsatisfactory—we lost 187 of our 294 cases and, in any event, had no significant results.

²²⁴ A precedent was treated as “prior” for a particular judge’s decision only if the former preceded the latter by at least seven days. The reasons for our “rule of seven days” were necessity and reality. The dates for decisions included in the information received from the Sentencing Commission were not necessarily precise; in some instances, the date is the date upon which the judge signed the order, but in other cases it is the date upon which the order was entered on the court docket. The difference between the date of signature and date of docketing was ordinarily less than a week. For a precedential factor, however, it means that a decision recorded as issued by Judge A on March 15, and a decision recorded as issued by Judge B on March 18, may as a practical matter have been issued slightly in opposite chronological order. In any event, decisions that were issued only seven or fewer days apart were essentially the equivalent of issuing simultaneous orders in which neither is precedent for the other. We concluded that a district judge: (1) may be unlikely to know about another district judge’s decision entered on the docket only a week previously; (2) is less likely to be influenced by another decision that is so new as to be barely entered upon the docket sheet as compared to a decision entered earlier; and (3) is likely to have already been well along in the process of reaching a conclusion on such a momentous issue as the constitutional validity of the Guidelines when that decision is dated within a week of another judge’s decision. Moreover, if a judge were profoundly influenced by a ruling that was issued just before he had intended to issue his own, his likely reaction would be to delay issuance of his opinion until it could be rewritten to take into account the new decision, thereby probably separating the date of issuance from the new precedent by at least seven days.

For purposes of this precedential variable, we excluded, both as precedential for other judges and in terms of measuring the influence of precedent upon them, the nine judges for whom we did not have a specific date of decision. To avoid treating them as missing cases in the regression, we coded these nine judges as facing zero precedential influence. For the one judge who reversed himself by issuing decisions on both sides of the issue—separated by about one month—both decisions were counted for precedential purposes in opposite directions.

²²⁵ We counted precedent by judge, not by decision. This was important because of decisions like *United States v. Ortega Lopez*, 684 F. Supp. 1506 (C.D. Cal. 1988) (en banc), where 14 judges of the Central District of California joined in an en banc opinion invalidating the Guidelines and 10 joined in a dissent arguing the Guidelines’ constitutionality. Counting only decisions would have underestimated the impact of such opinions.

²²⁶ For example, where there were 3 constitutional rulings and 7 unconstitutional rulings, the value would be $(3-7) * |3-7| / 10 = -1.60$.

situations where there was merely a margin of one among multiple decisions.²²⁷

Thus, the formula used for the PREC-CIR variable accounts for both the ratio of constitutional to unconstitutional rulings and, through squaring, the proportionally changing weight of the precedent. A positive value indicates that within the circuit at the time of a particular judge's ruling, more judges were finding the Guidelines constitutional than unconstitutional; a negative value indicates the reverse. We included the PREC-CIR variable in the standard set of independent variables only with respect to the general outcome dependent variable because we measured precedent solely by basic outcome, and not by any other measure.²²⁸

G. Summary of Independent Variables

Table 1 provides a short description of the variables included in our standard set, and Table 2 provides a statistical summary of these variables including means and standard deviations.

TABLE 1
DESCRIPTION OF STANDARD VARIABLES

Variable	Definition
OUTCOME	Judges' decision re: constitutionality of Guidelines (1=constitutional)
SEX	Gender (1=female)
RACE	Racial or ethnic origin (1=racial or ethnic minority)
LAW-SCHOOL	Graduation from an elite law school (1=yes)
CRIME-RATE	Total state crime index (rate per 100,000 inhabitants), 1988
PARTY	Political party of appointing president (1=Republican)
PROSECUTOR	Prior employment as a government prosecutor (1=yes)
DEFENSE	Prior employment as a defense attorney (1=yes)
MILITARY	Prior service in military (1=yes)
LAW-PROF	Prior employment as a full-time law professor (1=yes)
POLITICAL	Prior employment in an elected or appointed political position (1=yes)
JUDGE	Prior employment as a state or local judge (1=yes)
ABA-AQ	ABA rating of "Well Qualified" or above (1=yes)
ABA-BQ	ABA rating of "Qualified/Not Qualified" or below (1=yes)
CASELOAD	Total (civil + criminal) weighted caseload, per judge
SENIORITY	Number of months on bench from appointment to date of decision
PROMO-POT	Judicial promotion potential factor score
PREC-CIR	Ratio of con./uncon. Guidelines decisions within circuit

²²⁷ For example, where there was a prior single-judge decision finding the Guidelines constitutional, the value would be $(1-0) * |1-0| / 1 = 1.0$. By contrast, where there were three prior single-judge decisions, two finding the Guidelines constitutional and one finding them unconstitutional, the value would be $(2-1) * |2-1| / 3 = 0.33$.

²²⁸ We are in the beginning stages of further work on the influence of precedent which would extend to measuring precedent by theoretical category.

TABLE 2
SUMMARY OF STANDARD VARIABLES

Variable	Mean	SD
OUTCOME	.39	.49
SEX	.1	.29
RACE	.1	.29
LAW-SCHOOL	.26	.44
CRIME-RATE	5983.65	1625.86
PARTY	.61	.49
PROSECUTOR	.41	.49
DEFENSE	.13	.34
MILITARY	.62	.49
LAW-PROF	.04	.19
POLITICAL	.1	.29
JUDGE	.37	.48
ABA-AQ	.51	.5
ABA-BQ	.06	.25
CASELOAD	474.54	97.65
SENIORITY	113.12	80.17
PROMO-POT	-.39	1.22
PREC-CIR	-1.94	4.26

IV

THE DEPENDENT VARIABLES—OUTCOME AND REASONING

A. *Analysis of Judicial Decisions—Outcome as a Dependent Variable*

In 1988, 293 judges rendered 294 decisions on the constitutionality of the Sentencing Guidelines. As Table 3 illustrates, the federal judges were roughly split, with 115 decisions (39%) ruling the Guidelines constitutional, and 179 (61%) declaring the Guidelines unconstitutional.²²⁹

Our judicial utility maximization model predicts that the probability of a federal district judge finding the Guidelines constitutional depends on six groups of factors: a judge's general background, political ideology, prior employment, judicial role or institution, potential for promotion, and precedent. Because we analyzed the

²²⁹ Table 3 reports only the distribution of categorical variables. Other important, non-categorical variables are included in our standard set of variables as summarized in Tables 1 and 2 and reflected in later tables reporting results from logistic regression analyses.

TABLE 3
SUMMARY STATISTICS ON CONSTITUTIONAL/
UNCONSTITUTIONAL OUTCOME

	Con.	Uncon.	(N)
All Judges	115 (.39)	179 (.61)	294
By Sex			
Male	105 (.40)	161 (.61)	266
Female	10 (.36)	18 (.64)	28
By Race/Ethnicity			
White (non-Hispanic)	107 (.40)	159 (.60)	266
(other)	8 (.29)	20 (.71)	28
By Law School			
Elite Law School	25 (.33)	50 (.67)	75
Non-Elite Law School	90 (.41)	129 (.59)	219
By Party of Appointing President			
Republican	75 (.42)	103 (.58)	178
Democrat	40 (.35)	76 (.66)	116
By Prior Employment			
Prosecutor			
Yes	48 (.40)	72 (.60)	120
No	67 (.39)	107 (.62)	174
Defense Lawyer			
Yes	10 (.26)	29 (.74)	39
No	105 (.41)	150 (.59)	255
Military			
Yes	67 (.37)	115 (.63)	182
No	48 (.43)	64 (.57)	112
Law Professor			
Yes	3 (.27)	8 (.73)	11
No	112 (.40)	171 (.60)	283
Political Experience			
Yes	11 (.39)	17 (.61)	28
No	104 (.39)	162 (.61)	266
Judge			
Yes	49 (.45)	59 (.55)	108
No	66 (.36)	120 (.65)	186
By ABA Rating			
Above Qualified	56 (.38)	93 (.62)	149
Qualified	53 (.42)	72 (.58)	125
Below Qualified	6 (.32)	13 (.68)	19

influences of multiple variables, a multiple regression model was necessary. Within the array of appropriate regression models, we settled on logistic regression.²³⁰

²³⁰ Our selection of logistic regression may warrant some discussion. Our dependent variable—OUTCOME—is dichotomous, coded “1” if the judge ruled the Guidelines constitutional and “0” if not, and, as such, the usual linear regression models, such as Ordinary Least Squares (OLS), are not appropriate. OLS models, for example, allow the predicted values to fall outside the 0 to 1 range of our dependent variable. Moreover, OLS is relatively less efficient as the error cannot be normally distributed nor can it have constant variance. For a fuller discussion of these points, see Michael O. Finkelstein & Bruce Levin,

Along with a statistical model, we also needed to generate a standard set of independent variables (as described earlier and summarized in Tables 1 and 2). In addition to the issues discussed above, multicollinearity influenced our selection of our standard variable set.²³¹ We could not, of course, include together related variables that were highly collinear.²³² We adopted a conservative approach toward this problem.²³³

Statistics for Lawyers 447-52 (1990); John Fox, *Applied Regression Analysis, Linear Models, and Related Methods* 442 (1997).

In contrast to OLS models, logit and probit models deal quite well with a dichotomous dependent variable and either model is generally appropriate. We settled on a logit model for two reasons. First, logit models possess the practical advantages of relative ease and interpretability. See Fox, *supra*, at 444-46. Second, the weight of the empirical literature favors logit models. See, e.g., Eisenberg & Johnson, *supra* note 32, at 1185 n.155; Vicki Schultz & Stephen Pettersen, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. Chi. L. Rev. 1073, 1121 (1992).

In logistic regression, the dependent variable is the natural log of the odds ratio of the probability that an event occurs to the probability that it does not occur [$L = \log[p/(1-p)]$]. For more on logistic regression models, see generally John H. Aldrich & Forrest D. Nelson, *Linear Probability, Logit, and Probit Models* (1984) (deriving equations for logit and probit models); Alfred DeMaris, *Logit Modeling: Practical Applications* (1992) (describing use and application of logit model); Eric A. Hanushek & John E. Jackson, *Statistical Methods for Social Scientists* 179-216 (1977) (explaining discrete variable problem and deriving logit and probit models). Although logit and probit models both transform the actual proportion responding on the independent variables, probit models do so by replacing the observed proportions with the value of the standard normal curve below which the observed proportion of the area is located.

²³¹ Through data gathering (and subsequent statistical manipulation) we generated more than 100 variables, most different formulations of the same type of variable.

²³² For example, as discussed in Part V.A.3 *infra*, we generated a variable AGE for a judge's age. Not surprisingly, a judge's age was closely related to the length of a judge's tenure on the bench, which was coded in the SENIORITY variable. Thus, for multicollinearity reasons, we could not, of course, include both variables in a single regression. Moreover, multicollinearity concerns precluded the inclusion of both ELECTED and POLITICAL or of both REAGAN and PARTY in the same logistic regression equation.

²³³ We adopted a two-fold approach to guard against multicollinearity: First, for every model presented we generated bivariate correlation matrices for all independent variables. No firm "rule" exists within the literature. See, e.g., George W. Bohrnstedt & David Knoke, *Statistics for Social Data Analysis* 407 (2d ed. 1988) (suggesting exclusion of variables where coefficients exceed 50%); Finkelstein & Levin, *supra* note 230, at 352 ("A simple (but not foolproof) test for multicollinearity involves looking for high correlations (e.g., in excess of .9) in pairs of explanatory variables"); Michael S. Lewis-Beck, *Applied Regression: An Introduction* 60 (1980) ("For diagnosis, we must look directly at the intercorrelation of the independent variables. A frequent practice is to examine the bivariate correlations among the independent variables, looking for coefficients of about .8, or larger."). In every instance, we adopted the more conservative approach. Thus, where two potential independent variables' coefficients exceeded 50%, we excluded one of the related variables. Second, even where coefficients did not exceed the 50% threshold, variables were excluded if two or more were intended to serve as proxies for the same idea or where, in theory, two variables were too closely linked. For example, although the bivariate coefficient for variables CASELOAD and CRIM-CASELOAD (-.15) did not ex-

TABLE 4
 PROBABILITY OF A CONSTITUTIONAL JUDICIAL OUTCOME
 (CONSTITUTIONAL = 1)

	Standard	Crim. Caseload Alternative
<i>Demographic</i>		
SEX	-.56 (.50)	-.53 (.51)
RACE	-.67 (.50)	-.71 (.50)
LAW-SCHOOL	-.17 (.31)	-.11 (.32)
CRIME-RATE	-2.4(e-05) (8.34)(e-05)	-7.7(e-05) (8.88)(e-05)
<i>Political</i>		
PARTY	.24 (.29)	.20 (.29)
<i>Prior Employment</i>		
PROSECUTOR	.24 (.28)	.30 (.28)
DEFENSE	-.75 (.43)	-.90* (.44)
MILITARY	-.28 (.30)	-.35 (.30)
LAW-PROF	-.53 (.72)	-.49 (.73)
POLITICAL	.11 (.45)	.14 (.45)
JUDGE	.62* (.28)	.60* (.28)
<i>Judicial Role or Institution</i>		
ABA-AQ	-.19 (.27)	-.18 (.27)
ABA-BQ	-.60 (.58)	-.58 (.59)
CASELOAD	-.00 (.00)	—
CRIM-CASELOAD	—	3.44* (1.64)
SENIORITY	.00 (.00)	.00 (.00)
<i>Promotion Potential</i>		
PROMO-POT	.28* (.12)	.25* (.12)
<i>Precedent</i>		
PREC-CIR	.07* (.03)	.07* (.03)
(constant)	.47 (.99)	-.30 (.73)
% accurately predicted by model	63.57	68.04
McFadden's pseudo R ²	.06	.07
N	291	291

* p < .05

Table 4 presents the results of our logistic regression analyses that test the influence of each independent variable on a judge's likelihood of ruling the Sentencing Commission Guidelines constitutional, while simultaneously controlling for all other independent variables. A positive coefficient for a variable indicates that, controlling for all other independent variables, the presence of that particular independent variable increased the likelihood of a positive constitutional decision. Conversely, a negative coefficient signals that a variable decreased the likelihood of a decision sustaining the constitutionality of the Guidelines.

The first column of the table presents the results of a regression analysis with our standard set of independent variables. The second column presents the results of an alternative regression analysis in which we replaced our standard workload variable (CASELOAD) with a substitute variable (CRIM-CASELOAD) that is designed to assess the relative influence of a judge's criminal docket.

Part V presents an integrated interpretation of the significant findings for all the independent variables, standard and substitute, across all of the dependent variables included in our study.

B. Analysis of Judicial Decisions—Reasoning Categories as Dependent Variables

1. Method of Analyzing Opinions

To create our dependent variables for the content analysis component of our study, we had to analyze each opinion for both constitutional theories addressed and general reasoning approach.²³⁴ Two of us separately read and coded each opinion, usually in groups of ten opinions over the course of a week. We then exchanged results and discussed any differences. We divided the opinions into five binders by circuit and constitutional outcome, and we alternated constitutional and unconstitutional volumes. We were concerned that our opinion analysis should be as objective as possible and so constructed a relatively elaborate review mechanism involving the third coauthor and colleagues. As it turned out, our disagreements were few and all were resolved without troubling the third coauthor. Only a small number required substantive discussion.

ceed our .5 threshold, we did not include both variables in the same equation as both were designed to serve as proxies for a judge's workload.

²³⁴ To create the categories and codes, we initially analyzed a more or less random sample of opinions and discussed the possible codes. As we coded and discovered the need for additional codes, such as unusual variations or combinations of other codes, we added them.

Coding appeared to be straightforward when we began, and for the most part it was. There were a few opinions that simply defied analysis on any grounds except outcome; those we coded only for the basic constitutional/unconstitutional result. Many opinions were straightforward, in part because their authors made good use of section headings or topic sentences. Some of the more opaque opinions could be coded by examining which precedents were cited. Most challenging were the opinions that adopted numerous other opinions by reference. We left those to be coded last and attributed to the analyzed opinion each theory present in the referenced opinions. Because we could not know in advance how the distribution of opinions would develop, we decided to code the opinions for as many variations as possible. We therefore created codes for each issue, subissue and combination thereof. When we began the regression analysis, we collapsed these codes into binary dependent variables.

We feel confident that our coding is an accurate reflection of the opinions' content.²³⁵ Our cautious approach to attributing characteristics, duplicate coding, and close agreement on the results ensured that the coding was not simply the projection of our own views onto the opinions.

Table 5 summarizes the coding of our four constitutional theory claim variables and the two reasoning approach variables. The diversity of theoretical bases for the judges' rulings is apparent, with the separation of powers claims the most common rationale for finding the Guidelines unconstitutional.

TABLE 5
SUMMARY STATISTICS ON DEPENDENT VARIABLES

	Con.	Uncon.	(N)
<i>All Judges</i>	115 (.39)	179 (.61)	294
<i>Constitutional Claims</i>			
SOP — Branch Location	63 (.36)	112 (.64)	175
SOP — Judge Members	60 (.35)	110 (.65)	170
Non-Delegation Doctrine	89 (.69)	41 (.32)	130
Due Process Claim	30 (.42)	42 (.58)	72
<i>Reasoning Approach</i>	Present	Not Present	
Practical	33 (.34)	64 (.66)	97
Originalism	33 (.34)	64 (.66)	97

One question that naturally arises is the relationship among the various dependent variables we used. Table 6 presents summary statistics on the correlation between the various constitutional theory

²³⁵ A complete list of opinions and their codes is available from the authors on request.

variables. Our constitutional theory variables differ from the overall outcome variable in two ways. First, as described earlier, not every opinion discussed all four legal theories. The subset of data available for analysis of judges' rulings on the Non-Delegation Doctrine therefore differed significantly from the subset available for analysis of judges' rulings concerning the location of the Sentencing Commission in the tripartite federal system (Separation of Powers-Branch). To the extent that consideration of different constitutional theory dependent variables meant we were considering different subsets of the data, the second and third lines of each cell in Table 6 show the percentage of opinions coded on each variable that were coded on both. The second line shows the percentage of cases coded for the dependent variable listed in the row that is also coded for the dependent variable in the column. The third line shows the percentage of cases coded for the dependent variable listed in the column that is also coded for the dependent variable in the row. Thus, for example, in comparing the Non-Delegation Doctrine variable with the Separation of Powers-Branch variable, there were 130 opinions coded for the Non-Delegation Doctrine and 175 opinions coded for Separation of Powers-Branch. Of these, 94% of the Non-Delegation Doctrine opinions were also coded for Separation of Powers-Branch, and 70% of the Separation of Powers-Branch opinions were also coded for the Non-Delegation Doctrine. As Table 6 shows, there are large differences between the data subsets used for each dependent variable, differences caused by the relatively frequent incidence of opinions which did not address all four issues.²³⁶ Although we would have preferred that each judge give us his or her views on each issue, we do not think that their failure to do so had a significant impact on our results. Indeed, a judge's decision to adopt one constitutional theory for resolu-

²³⁶ A judge upholding the Sentencing Guidelines would have to address and reject all constitutional theories raised by the defendant, while a judge invalidating the Guidelines could seize upon a single theory to accomplish that end. However, any bias in the data is likely minimized by the following four factors. First, a judge upholding the Guidelines was obliged to address only those constitutional theories actually raised by a defendant in challenging the application of the Sentencing Guidelines in his or her case, and many defendants did not raise the due process theory. Second, a judge invalidating the Guidelines would often apply a "belt-and-suspenders" approach, striking the Guidelines on more than one ground. Third, several judges affirmatively rejected certain challenges to the Guidelines, even when ultimately accepting another as a basis for invalidation. Fourth, in the end, there were only four theories in the universe of possible constitutional challenges, and the two separation of powers arguments were frequently combined in presentation and resolution.

tion of the case versus another conveys significant information in itself.²³⁷

The second type of difference in the constitutional theory variables concerns opinions that addressed multiple grounds for invalidating the Guidelines. For each pair of constitutional claims, we examined the correlation between the judge's resolution (constitutional versus unconstitutional) of the two claims. The correlation coefficient is shown in the first line of each cell in Table 6. Thus, for example, the correlation coefficient for judges addressing the Non-Delegation Doctrine claim and the Separation of Power-Branch claim is 0.60, indicating a relatively large weak correlation between judges' views about the two claims, while the correlation coefficient for the two separation of powers theories is a high 0.95. This is unsurprising, since the two separation of powers theories relied upon many of same legal precedents and lines of constitutional analysis and the judges' views of the constitutionality of the Sentencing Guidelines under those theories would likely be similar. Thus, overall, as Table 6 indicates, the four constitutional theory dependent variables do indeed measure different things.

TABLE 6
DEPENDENT VARIABLES (SELECTED) CORRELATION MATRIX

	SOP-Br	SOP-J	NDD
SOP-J	.95**		
% Row	(.97)		
% Column	(.94)		
NDD	.60**	.60**	
% Row	(.94)	(.91)	
% Column	(.70)	(.69)	
Due Process	.94**	1.0	.56**
% Row	(.96)	(.96)	(.92)
% Column	(.39)	(.41)	(.51)

** p < .01

The constitutional claims dependent variables and the reasoning approach dependent variables are further explained immediately below, together with tables reporting the results of regression analyses. Further explanation and interpretation of those results follow in Part V.

²³⁷ See *infra* Part V.A.2 (discussing disproportionate numbers of minority judges who adopted due process constitutional theory in invalidating Sentencing Guidelines).

2. *Methodology and Summary of Results*

a. Constitutional Claims Rulings. We explored the particular constitutional claims that the judges addressed in their rulings and their choice of theories to resolve those challenges.²³⁸ The opinions were coded into four general categories of constitutional claims following the arguments made by the parties:²³⁹ (1) Separation of Powers—Branch Location; (2) Separation of Powers—Judge Members; (3) Non-Delegation Doctrine; and (4) Due Process. To reduce the subjectivity of the opinion coding process, we followed the judges' written signals about what constitutional claims the judges thought they were addressing and what theories they thought they were applying, rather than imposing an outside analytical framework upon the judges' reasoning. Thus, for example, if a judge purported to address a separation of powers issue, even though the analysis seemed more suited to a due process evaluation, we coded the opinion as a separation of powers resolution.²⁴⁰

i. Separation of Powers—Branch Location As discussed earlier, the leading constitutional challenge to the Sentencing Commission was grounded in the separation of powers doctrine.²⁴¹ Opponents contended that the Sentencing Reform Act assigned an executive function—rulemaking—to a judicial entity in violation of Article III of the Constitution. The Department of Justice in the Reagan Administration argued that, while Congress had erred in designating an entity with the attributes of an executive agency as a body in the judicial branch, that designation is without substantive meaning. Accordingly, the Department effectively requested reassignment of

²³⁸ The set of independent variables we employed to generate results for the content analysis dependent variables is structured quite similarly to that used for the general outcome dependent variable. See *supra* Part IV.A. However, because the precedent variable (PREC-CIR) was measured solely by outcome, see *supra* Part III.F, this variable is dropped from our standard set.

²³⁹ See *supra* Part II.B.1.

²⁴⁰ For example, in *United States v. Christman*, No. CR88-4-2 (D. Vt. Nov. 19, 1988) (en banc), three district judges invalidated the Guidelines in part on the grounds that judicial authority in the sentencing process includes the discretion “to apply reasonable and appropriate factors in the light of the circumstances of the case presented to the court” and that the Guidelines improperly “replace the judicial discretion vested in the courts by substituting the sentencing factors and punishment structured by the Sentencing Commission.” *Id.* at 7-8. Although this reasoning is very similar to the due process claim of a right to individualized sentencing by a judge with full discretion, these judges had expressly refused to consider the due process argument, holding that the claim would not be ripe until a Guidelines sentence was actually imposed. See *id.* at 4-5. Thus, despite our impression that the reasoning fit more comfortably under a due process analysis, these judges considered their holding to be based upon a separation of powers violation, and we coded it as such.

²⁴¹ See *supra* notes 85-92 and accompanying text.

TABLE 7
 SEPARATION OF POWERS — BRANCH LOCATION
 (CONSTITUTIONAL OR LOCATION IN BRANCH = 1)

	General Outcome	Executive Branch	Judicial Branch
<i>Demographic</i>			
SEX	-.09 (.67)	-1.02 (1.29)	.13 (.75)
RACE	-.82 (.65)	-8.51 (28.53)	-.82 (.80)
LAW-SCHOOL	-.30 (.41)	.26 (.77)	-.60 (.53)
CRIME-RATE	-.00 (.00)	-0.00** (.00)	9.98(e-05) (.00)
<i>Political</i>			
PARTY	-.24 (.39)	-.91 (.75)	-.03 (.48)
<i>Prior Employment</i>			
PROSECUTOR	.43 (.38)	—	—
DEFENSE	-1.13 (.62)	.04 (1.16)	-1.48 (.85)
MILITARY	-.54 (.39)	-1.40* (.71)	-.28 (.46)
LAW-PROF	-.17 (.98)	-1.74 (1.90)	.21 (1.25)
POLITICAL	.10 (.55)	—	—
JUDGE	.51 (.36)	.75 (.68)	.25 (.43)
EXECUTIVE	—	3.46 (1.77)	-1.20 (1.40)
LEGISLATIVE	—	-1.95 (1.69)	.72 (.66)
<i>Judicial Role or Institution</i>			
ABA-AQ	-.36 (.36)	.33 (.67)	-.82 (.44)
ABA-BQ	-.90 (.79)	-7.92 (36.32)	-.77 (.91)
CASELOAD	.00 (.00)	-0.00 (.00)	-.00 (.00)
SENIORITY	-.00 (.00)	-0.00 (.00)	-.00 (.00)
<i>Promotion Potential</i>			
PROMO-POT	.31 (.17)	-.50 (.41)	.29 (.21)
(constant)	.90 (1.41)	3.61 (2.40)	-.05 (1.68)
% accurately predicted by model	64.57	93.14	78.05
McFadden's pseudo R ²	.08	.32	.09
N	175	175	164

* p < .05; ** p < .01

the Commission to the executive branch. By contrast, the Sentencing Commission defended the statute on its own terms and argued that the Commission is properly located within the judicial branch.²⁴²

In coding the opinions we explored three different alignments of judicial reasoning. Table 7 presents those results:

First, as reported in Column 1 ("General"), we coded opinions as either upholding or invalidating the Guidelines on separation of powers grounds by reason of the branch location of the Commission. A constitutional ruling was coded "1" (63 judges), and an unconstitutional ruling was coded "0" (112 judges).

Second, as reported in Column 2 ("Executive Branch"), we coded opinions for whether they adopted the Department of Justice's position that the Commission should be regarded as validly located in the executive branch (code="1", 16 judges). For purposes of this analysis, any ruling that differed from the Department's approach—whether by invalidating the Commission as unconstitutional or upholding the Commission on an alternative ground such as proper location in the judicial branch—was coded as a rejection of the Department's preferred position (code="0", 159 judges). Moreover, in testing the influence of the Justice Department's approach, we replaced the POLITICAL variable with two substitute variables—EXECUTIVE and LEGISLATIVE.²⁴³

Third, as reported in Column 3 ("Judicial Branch"), we coded opinions for whether they adopted the Sentencing Commission's position that the Commission is properly designated as a judicial branch entity and is constitutional (code="1", 36 judges). For purposes of this analysis, any ruling that differed from the Commission's approach—

²⁴² If a judge found that the Sentencing Commission was appropriate in terms of function and operation in either the judicial branch or the executive branch, but objected to the mandatory participation of judges upon the Commission, the opinion was classified for branch location purposes without considering the deciding judge's view of the validity of judges serving on the Commission. The question of mandatory judicial participation upon the Commission was analyzed in the Separation of Powers-Judge Member category discussed below. Thus, for example, if a judge concluded that relocation of the Commission to the executive branch would not be enough to make the Commission constitutional *only* because of the participation of judges in an executive branch entity, the judge was treated for branch location purposes as concluding that the Commission would be constitutional in terms of function and operation in the executive branch. The invalidation of the Commission by reason of judge membership was reserved for separate analysis in that distinct phase of the study. See *infra* Part IV.B.2.a.ii.

²⁴³ We substituted these two variables for POLITICAL rather than adding them to our set of variables due to multicollinearity concerns. See *supra* notes 192-95 and accompanying text. Out of an abundance of caution, we also excluded the PROSECUTOR variable in this regression as well. Although EXECUTIVE was not defined to include federal prosecutors, we believe the variables are theoretically correlated and thus properly treated as though collinear.

whether by invalidating the Commission as unconstitutional or upholding the Commission on an alternative ground such as relocation to the executive branch—was coded as a rejection of the Commission's preferred position (code="0", 128 judges). However, we omitted any ruling that upheld the constitutionality of the Commission while avoiding discussion of the branch location issue, as such a ruling could not be categorized as either an adoption or rejection of the Commission's position.

ii. Separation of Powers—Judge Members As discussed earlier, another standard challenge to the Sentencing Commission concerned the required membership of three federal judges.²⁴⁴ Criminal defendants criticized this mandatory judicial participation in an extrajudicial capacity as impairing the work of the judicial branch and undermining the impartiality of the judiciary.²⁴⁵ Judges who found required judicial participation on the Commission constitutionally permissible were coded "1" (60 judges); judges who invalidated the Commission by reason of mandatory judicial membership were coded "0" (110 judges).

Results from our logistic regression analyses of this dependent variable are reported in Table 8. Column 1 contains the results from our standard set of independent variables. For Column 2, we replaced CASELOAD with CRIM-CASELOAD for comparison due to slightly different results.

iii. Non-Delegation Doctrine Rulings

The third category of constitutional challenge to the Sentencing Commission's work fell under the label of nondelegation doctrine. Defendants attacked the Commission's statutory authority to promulgate Sentencing Guidelines as an improper or excessive delegation of legislative power.²⁴⁶ Those rulings that upheld the Guidelines against nondelegation doctrine attacks were coded as "1" (89 judges). Those rulings that invalidated the Guidelines on this ground, whether on the theory that Congress may not delegate the core function of sentencing

²⁴⁴ See *supra* notes 93-97 and accompanying text.

²⁴⁵ The question of whether the Sentencing Reform Act validly authorizes the President to remove the judge members from the Commission was classified as a branch location concern for our study, rather than as a judge members concern. The removal question asked whether it was appropriate for the head of one branch to exercise removal power over officials in another branch, which thus focused upon the purported location of the Commission in the judicial branch. By contrast, the requirement that judges serve upon the Commission, whatever its branch location, raised other issues about judges participating in a lawmaking or regulationissuing body and whether that participation impaired the impartiality of the individual judges or the judiciary as a whole.

²⁴⁶ See *supra* notes 98-101 and accompanying text.

TABLE 8
 SEPARATION OF POWERS — JUDGE MEMBERS
 (CONSTITUTIONAL = 1)

	Standard	Crim. Caseload	Alternative
<i>Demographic</i>			
SEX	.03 (.71)	-.21 (.73)	
RACE	-.81 (.69)	-.84 (.69)	
LAW-SCHOOL	-.29 (.44)	-.32 (.45)	
CRIME-RATE	-.8.3 (e-05) (.00)	-.00 (.00)	
<i>Political</i>			
PARTY	.14 (.41)	.08 (.41)	
<i>Prior Employment</i>			
PROSECUTOR	.71 (.40)	.90* (.42)	
DEFENSE	-2.55** (.89)	-3.07** (1.04)	
MILITARY	-.30 (.41)	-.42 (.42)	
LAW-PROF	.24 (1.02)	.24 (1.09)	
POLITICAL	-.02 (.60)	.06 (.61)	
JUDGE	.54 (.37)	.53 (.37)	
<i>Judicial Role or Institution</i>			
ABA-AQ	-.57 (.38)	-.60 (.39)	
ABA-BQ	-.84 (.80)	-.82 (.80)	
CASELOAD	-.00 (.00)	—	
CRIM-CASELOAD	—	5.53 (2.83)	
SENIORITY	-.00 (.00)	.00 (.00)	
<i>Promotion Potential</i>			
PROMO-POT	.40* (.19)	.47* (.19)	
(constant)	.52 (1.66)	.19 (1.02)	
% accurately predicted by model	69.41	68.24	
McFadden's pseudo R ²	.12	.14	
N	170	170	

* p < .05; ** p < .01

rules at all, or that the statute failed to provide an intelligible principle to guide the Commission's work, were coded as "0" (41 judges). Results from our logistic regression analysis of this dependent variable are reported in Table 9.

TABLE 9
NON-DELEGATION DOCTRINE RULINGS
(CONSTITUTIONAL = 1)

	Standard
<i>Demographic</i>	
SEX	.75 (1.23)
RACE	-.20 (.95)
LAW-SCHOOL	-.47 (.56)
CRIME-RATE	.00 (.00)
<i>Political</i>	
PARTY	.19 (.52)
<i>Prior Employment</i>	
PROSECUTOR	-.60 (.50)
DEFENSE	-.41 (.73)
MILITARY	-.59 (.57)
LAW-PROF	7.62 (24.67)
POLITICAL	.03 (.69)
JUDGE	.36 (.51)
<i>Judicial Role or Institution</i>	
ABA-AQ	-1.08* (.50)
ABA-BQ	-1.82 (1.10)
CASELOAD	.00 (.00)
SENIORITY	.00 (.00)
<i>Promotion Potential</i>	
PROMO-POT	.93** (.27)
(constant)	-.22 (2.07)
% accurately predicted by model	79.23
McFadden's pseudo R ²	.28
N	130

* p < .05; ** p < .01

iv. *Due Process Claim Rulings* A fourth and less typical category of constitutional challenge to the Sentencing Guidelines invoked the Due Process Clause of the Fifth Amendment of the Constitution as guaranteeing an individual right to be sentenced by a judge with discretion to evaluate the circumstances of the crime and the charac-

teristics of the offender.²⁴⁷ While the vast majority of judges addressed the separation of powers challenges, and most judges addressed the nondelegation doctrine, only 72 of the 188 judges (38%) issuing or participating in written opinions addressed the due process question.²⁴⁸ Accordingly, conclusions and inferences should be drawn from Table 10 with some care.

Results from our logistic regression analysis examining how the Guidelines fared against a due process claim are reported in Table 10. Rulings that upheld the Guidelines against due process challenges were coded as "1" (30 judges). Those rulings that invalidated the Guidelines on this ground were coded as "0" (42 judges).

b. Reasoning Approach

i. Practical Versus Theoretical Reasoning. In coding the opinions, we distinguished between reasoning primarily concerned with the practical effects of the decision from that primarily concerned with more abstract constitutional theory.²⁴⁹ In the "Practical" category, we placed opinions that focused, with concrete examples of a largely factual nature, on the consequences of applying the Guidelines to defendants or the effects of judges serving on the Commission to the independence of the judiciary.²⁵⁰ In the "Theoretical" category, we placed opinions that focused on constitutional theory, generally divorced from real world consequences or nitty gritty practical

²⁴⁷ See *supra* notes 102-04 and accompanying text.

²⁴⁸ For coding purposes, we treated claims by defendants that the availability of probation as a sentence is compelled by due process as a species of the individualized sentencing right theory. The purported requirement that a judge be able to consider a certain sentencing option—whether it is probation or a shorter period of years—is inescapably an individualized sentencing claim.

²⁴⁹ We had and still have doubts about whether this categorization effort was fully successful and made objective and adequate distinctions. See *infra* Part V.A.6 (discussing correlation between law school education and practical reasoning). One reviewer criticized our practical/theoretical dichotomy, suggesting we may have confused formalism with theoretical reasoning. In his view, for example, we may have mistakenly characterized a formalistic discussion of separation of powers as theoretical although it did not evidence high-minded thinking. However, it was not our intent in this study to distinguish legal formalism from other theoretical forms of reasoning, but rather to distinguish both from the nitty gritty, "street smarts" practical legal thinking displayed from the bench by some trial judges. Nonetheless, the critique is well-taken, both in expressing some dissatisfaction with our implementation of this variable and in prompting us to undertake further exploration. Recognizing that the Sentencing Guidelines decisions are a treasure trove of data, we intend in a future study to further examine legal reasoning by coding these opinions by such analytical categories as legal formalism, legal realism/political, and aspirational/prophetic.

²⁵⁰ See, e.g., *United States v. Schwartz*, 692 F. Supp. 331, 337-40 (D. Del. 1988) (engaging in pragmatic analysis of Sentencing Commission activities).

TABLE 10
DUE PROCESS CLAIM RULINGS
(CONSTITUTIONAL = 1)

	Standard
<i>Demographic</i>	
SEX	1.31 (1.51)
RACE	-3.90** (1.49)
LAW-SCHOOL	-1.48 (.89)
CRIME-RATE	-.00 (.00)
<i>Political</i>	
PARTY	.11 (.91)
<i>Prior Employment</i>	
PROSECUTOR	.54 (.71)
DEFENSE	-3.28* (1.49)
MILITARY	.12 (.74)
LAW-PROF	1.34 (1.63)
POLITICAL	-.89 (1.91)
JUDGE	.43 (.70)
<i>Judicial Role or Institution</i>	
ABA-AQ	-1.41* (.71)
ABA-BQ	.12 (1.35)
CASELOAD	.01 (.01)
SENIORITY	-.01 (.01)
<i>Promotion Potential</i>	
PROMO-POT	.07 (.36)
(constant)	-.48 (3.14)
% accurately predicted by model	76.39
McFadden's pseudo R ²	.32
N	72

* p < .05; ** p < .01

effects.²⁵¹ Although the existence of both in a single opinion was not uncommon, we looked for what reasoning approach predominated in the balance.²⁵²

We classified the reasoning of 97 judges authoring opinions, with 24 adopting a practical approach and 73 adopting a theoretical approach. Table 11 reports the results of our logistic regression analysis on the Practical versus Theoretical dependent variable.

ii. Originalist Versus Nonoriginalist Reasoning. Through coding of the opinions, we explored use of originalist versus nonoriginalist approaches to constitutional interpretation. We adopted this particular theory of constitutional interpretation for closer examination *not* because the originalist versus nonoriginalist dichotomy is the objectively correct general theory for categorizing constitutional thought, either normatively or descriptively.²⁵³ We fully appreciate that contemporary constitutional interpretation involves a pluralism of methods and theories, including originalism, textualism, fundamental rights analysis, civic republicanism, and prudential argument or pragmatism.²⁵⁴ Rather, we have examined originalism in this study for reasons of interest, historical context, and practical feasibility.

First, originalism as a theory of interpretation has been a centerpiece in constitutional debate in the last two decades, by both advocates and critics.²⁵⁵ Thus, however incomplete it may be for a full

²⁵¹ See, e.g., *United States v. Chambless*, 680 F. Supp. 793, 797-802 (E.D. La. 1988) (engaging in theoretical analysis of separation of powers issues).

²⁵² When an opinion authored by a judge contained more than a de minimis amount of analysis, we coded it by reasoning approach, both in terms of practical versus theoretical reasoning and originalist versus nonoriginalist reasoning (as discussed *infra* Part IV.B.2.b.ii). When a judge recited that he was adopting the holding of another opinion, but offered no further analysis, we were unable to classify that opinion by reasoning approach. Thus, those opinions were coded only by the constitutional claims addressed and theories adopted in the cited opinion and are not included in this study of practical versus theoretical reasoning or the following study of originalist versus nonoriginalist reasoning. Likewise, when a judge participating in an *en banc* proceeding merely joined an opinion written by another judge, the joining judge was coded according to the constitutional claims addressed and theories adopted by the authored opinion, but not by reasoning approach.

²⁵³ See Stephen M. Griffin, *American Constitutionalism* 155 (1996) (arguing that textual, doctrinal, and prudential approaches to constitutional interpretation cannot be captured in originalist/nonoriginalist dichotomy).

²⁵⁴ See generally *id.* at 143-91.

²⁵⁵ Compare Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (1990), Earl M. Maltz, *Rethinking Constitutional Law: Originalism, Interventionism, and the Politics of Judicial Review* (1994), Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995), Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. Rev. 353 (1981), and Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989), with Laurence H. Tribe & Michael C. Dorf, *On Reading the Constitution* 8-13, 97-117 (1991), Speech by Justice William J. Brennan to the Text

understanding of modern constitutional theory, it is worthy of empirical study. Second, the Sentencing Guidelines Crisis of 1988 erupted nearly contemporaneously with the failed 1987 Supreme Court nomination of Judge Robert H. Bork, a prominent advocate of an originalist approach to constitutional interpretation.²⁵⁶ Accordingly, public attention was sharply focused on originalist constitutional theory during this period,²⁵⁷ a matter of which the judges deciding the Guidelines cases naturally were aware. Moreover, Justice Scalia, another leading proponent of originalism, later cast his judicial vote on the Sentencing Guidelines in the negative in a dissent that had a definite originalist tone.²⁵⁸ Finally, and crucially for empirical study, among the plethora of theories of constitutional interpretation, originalism was most amenable to reasonably objective classification. Because of its formalist nature and its emphasis on text and history, an originalist analysis may be more readily identified in a judicial opinion.

For purposes of our study, we defined originalism as an analysis that rests primarily (but not exclusively²⁵⁹) on the purported original

and Teaching Symposium, Georgetown University (1985), reprinted in *The Great Debate: Interpreting Our Written Constitution* 11 (1986); see also Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204 (1980); Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 Fordham L. Rev. 1249 (1997); and Mark Tushnet, *The U.S. Constitution and the Intent of the Framers*, 36 Buff. L. Rev. 217 (1987). See generally Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. Pa. L. Rev. 1 (forthcoming 1998) (manuscript at 10-42, on file with the *New York University Law Review*) (presenting history of originalism, living constitutionalism, and historical fidelity as theories of interpretation, prevalent in many eras, including period between 1973 and 1997).

²⁵⁶ For commentary on the Bork nomination to the Supreme Court, see generally Bork, *supra* note 255, at 267-349; David G. Savage, *Turning Right: The Making of the Rehnquist Supreme Court* 133-46 (1992); Stephen M. Griffin, *Politics and the Supreme Court: The Case of the Bork Nomination*, 5 J.L. & Pol. 551, 551-604 (1989).

²⁵⁷ See Griffin, *supra* note 256, at 567-604 (concluding that Senate rejected as unduly strict Bork's judicial philosophy of neutral principles and original intent, but more generally that Bork was defeated because of his criticism of Supreme Court decisions on fundamental rights and civil rights that had come to be generally accepted as legitimate achievements); Tribe & Dorf, *supra* note 255, at 3 (claiming that "the Senate's decision to withhold its consent was based in large part on its rejection of Judge Bork's belief that a quest for the 'original intent' of the Framers of the Constitution is the only proper method of interpreting the Constitution"). But see Bork, *supra* note 255, at 9 (arguing that "the difference about the proper role of the courts is what the battle over [Bork's] confirmation was underneath" but that "the public campaign, designed to influence senators through public opinion polls, consisted of the systematic distortion of [his] academic writings and [his] judicial record and, it must be said, employed racial and gender politics of a most pernicious variety").

²⁵⁸ See *Mistretta v. United States*, 488 U.S. 361, 413-27 (1989) (Scalia, J., dissenting).

²⁵⁹ Cf. Robert K. Rasmussen, *A Study of the Costs and Benefits of Textualism: The Supreme Court's Bankruptcy Cases*, 71 Wash. U. L.Q. 535, 540 (1993) (declining, for purposes of study of Supreme Court opinions, to define "textualism" as theory of statutory interpretation so narrowly as to exclude any opinion that includes discussion of legislative

TABLE 11
 PRACTICAL V. THEORETICAL REASONING
 (PRACTICAL = 1)

	Standard
<i>Demographic</i>	
SEX	-1.68 (1.33)
RACE	1.35 (1.76)
LAW-SCHOOL	1.44* (.73)
CRIME-RATE	-.00 (.00)
<i>Political</i>	
PARTY	-.24 (.67)
<i>Prior Employment</i>	
PROSECUTOR	.64 (.65)
DEFENSE	.02 (.92)
MILITARY	-.34 (.68)
LAW-PROF	-7.07 (25.38)
POLITICAL	-2.53 (1.41)
JUDGE	.81 (.67)
<i>Judicial Role or Institution</i>	
ABA-AQ	.75 (.67)
ABA-BQ	.02 (1.70)
CASELOAD	-.01** (.00)
SENIORITY	.01* (.00)
<i>Promotion Potential</i>	
PROMO-POT	.35 (.26)
(constant)	3.53 (2.20)
% accurately predicted by model	82.47
McFadden's pseudo R ²	.28
N	97

* p < .05; ** p < .01

understanding as reflected by a primary concern with the text, linguistic understanding of the framing period, and history of the framing

history even if only to confirm result "gleaned from a close examination of the text," saying that "[t]he Justices, like all good lawyers, attempt to marshal all possible arguments for their side").

period (including founding era Supreme Court decisions).²⁶⁰ An opinion that includes a discussion of history subsequent to the founding period, policy concerns, or Supreme Court precedent would constitute an originalist opinion only if these matters were adduced to confirm the original meaning and did not dominate the analysis.²⁶¹

In examining the opinions for classification as "Originalist" or "Non-Originalist," we looked at such factors as: (1) the professed weight given to original understanding and founding era history; (2) the amount of space devoted in the opinion to original understanding and founding era history as contrasted with subsequent history, policy, and court precedent not from the founding era; and (3) the priority of placement in the opinion of original understanding and founding era history, that is, whether it serves as the starting point for analysis rather than as supplemental argument.²⁶² Furthermore, an opinion that addressed any significant constitutional claim in an originalist manner was classified as Originalist, even if other constitutional claims were discussed differently. Thus, for example, a judge who applied an originalist approach to the nondelegation doctrine issue was coded as an Originalist, even if the separation of powers discussion did not follow an originalist approach.

We classified the reasoning approaches of 97 judges authoring opinions by reasoning approach, fourteen of whom adopted an originalist interpretation and 83 of whom adopted a nonoriginalist interpretation.²⁶³ Table 12 presents the results of our logistic regression

²⁶⁰ See Antonin Scalia, *A Matter of Interpretation* 39 (1997) (observing that constitutional discussion is rarely "addressed to the text of the constitutional provision that is at issue, or to the question of what was the originally understood or even the originally intended meaning of that text"); Richard S. Kay, "Originalist" Values and Constitutional Interpretation, 19 Harv. J.L. & Pub. Pol'y 335, 336-40 (1996) (describing four methods advanced as originalism: (1) original text, (2) original intention, (3) original understanding, and (4) original values, and arguing that method of original intentions is most consistent with originalist values).

²⁶¹ See Scalia, *supra* note 260, at 39 (stating that typical "starting point" for constitutional analysis today is "Supreme Court cases, and the new issue will presumptively be decided according to the logic that those cases expressed, with no regard for how far that logic, thus extended, has distanced us from the original text and understanding").

²⁶² The results must be qualified both because we are looking at trial judges who may be less likely to be concerned with interpretation theory than appellate judges and because lower federal courts must follow Supreme Court precedents that may restrict the ability of a lower court judge to engage in originalist analysis.

²⁶³ We coded 14 judges as using an originalist approach to constitutional interpretation. All 14 originalists were independently coded as also engaging in theoretical (as opposed to practical) reasoning, as described in the previous subsection. This finding is not remarkable, as originalism by definition is a theoretical mode of analyzing a constitutional problem. Nonetheless, the two reasoning categories are not congruent and do not measure the same aspect of judicial reasoning. Of 59 judges who were coded as engaging in theoretical rather than practical reasoning, only a minority of 14 adopted an originalist as opposed to a no-

TABLE 12
ORIGINALIST V. NONORIGINALIST REASONING
(ORIGINALIST = 1)

	Standard	Reagan Alt.
<i>Demographic</i>		
SEX	.09 (1.43)	.36 (1.41)
RACE	-.87 (1.45)	-.83 (1.45)
LAW-SCHOOL	-.96 (1.04)	-.84 (1.02)
CRIME-RATE	.00 (.00)	.00 (.00)
<i>Political</i>		
PARTY	-3.76* (1.82)	—
REAGAN	—	-4.44* (1.89)
<i>Prior Employment</i>		
PROSECUTOR	-.13 (.85)	-.18 (.83)
DEFENSE	1.03 (.92)	1.21 (.91)
MILITARY	.63 (1.02)	.78 (1.01)
LAW-PROF	-8.28 (42.75)	-8.20 (41.92)
POLITICAL	.74 (.97)	.84 (.95)
JUDGE	-.65 (.82)	-.61 (.80)
<i>Judicial Role or Institution</i>		
ABA-AQ	-.49 (.86)	-.24 (.83)
ABA-BQ	-7.60 (49.19)	-7.43 (48.85)
CASELOAD	.00 (.00)	.00 (.00)
SENIORITY	-.04 (.02)	-.05* (.02)
<i>Promotion Potential</i>		
PROMO-POT	-.28 (.37)	-.25 (.35)
(constant)	.82 (3.36)	1.51 (3.43)
% accurately predicted by model	86.60	85.57
McFadden's pseudo R ²	.32	.30
N	97	97

* p < .05

nonoriginalist theoretical mode. Thus, the question remains, what influences a theoretically-oriented judge to select an originalist versus a nonoriginalist approach to resolving a constitutional problem?

analysis of this content analysis dependent variable. Column 1 contains the results from our standard set of independent variables. In the regression analysis reported in Column 2, we replaced PARTY with REAGAN, the dummy variable for judges appointed by President Reagan.

V

FINDINGS AND INTERPRETATION

One of the strengths of this study lies in its robust set of explanatory factors. However, that very feature complicates the task of reporting and interpreting the findings due to a host of intriguing results involving a multitude of both dependent and independent variables, with a wide range of theoretical and practical implications. For that reason, while certain general themes will become apparent, we determined that the most efficient way to present our findings is variable-by-variable, gathered into broad categories. Moreover, this structure allows us to discuss findings with respect to a particular variable or group of variables, not only in terms of the general constitutional/unconstitutional outcome, but also by evaluating whether the influence of the variable appeared in the more nuanced context of judicial reasoning as studied through the opinion content analysis stage of our study.

A. Demographic Variables

1. Sex

Building upon the "different voice" theory of psychologist Carol Gilligan,²⁶⁴ feminist legal theorists have postulated that female judges would present a different perspective and behave differently from men in deciding cases.²⁶⁵ Under this theory, "women tend to perceive moral conflicts as a problem of care and responsibility in relationships," while "men tend to emphasize rights and rules."²⁶⁶ While eschewing the feminist label as invoking a political agenda, Suzanna Sherry postulates a feminine attitude that "define[s] human existence in terms of relationships to others and [favors] contextual societal values and individual virtues," as contrasted with "the male emphasis on rights" and the consequent "reliance on an abstract rule-based

²⁶⁴ Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (1982) (suggesting that men and women develop different forms of moral reasoning, with women tending to apply an interdependent "ethic of care" while men focus on rights-based abstract moral principles).

²⁶⁵ See Davis, Haire & Songer, *supra* note 28, at 129-30 (describing theories of gender difference and judging); Fox & Van Sickel, *supra* note 29, at 2-7 (same).

²⁶⁶ Davis, Haire & Songer, *supra* note 28, at 129.

method" for resolving disputes.²⁶⁷ Thus, under this theory, female judges should be more concerned about "connection, care, response, substantive fairness, communitarian values, and context" than about "correctly applying appropriate legal rules."²⁶⁸

This theory leads directly to a hypothesis that female judges would resist the federal Sentencing Guidelines system because it imposes strict and rigid sentencing rules with little regard to context or fairness in the individual case.²⁶⁹ Indeed, feminist scholar Lucinda Finley's description of the contrast between male and female legal reasoning—"rationality, abstraction, a preference for statistical and empirical proofs [male reasoning] over experiential or anecdotal evidence [female reasoning]"²⁷⁰—directly parallels the conflict in views about application of the "statistical and empirical" Sentencing Guidelines as opposed to individualized sentencing by judges with discretion to consider "experiential or anecdotal evidence" about defendants. This study is therefore a good test of the role of "different voice" or

²⁶⁷ Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 Va. L. Rev. 543, 582 (1986). Subsequently, Sherry has described her view as "moderate"—that life experiences and gender "may have a subtle effect on beliefs, attitudes, or approaches"—and has sharply criticized the more radical feminist view "that women have an entire world view that differs substantially from that of men and that is in some sense generally inaccessible to men." Daniel A. Farber & Suzanna Sherry, *Beyond All Reason: The Radical Assault on Truth in American Law* 16, 30 (1997). Our study, especially in the context of other studies mentioned below, casts substantial doubt upon the viability of even this "moderate" view of a distinctive "feminine" approach to judicial decisionmaking.

²⁶⁸ Davis, Haire & Songer, *supra* note 28, at 130; see also Fox & Van Sickel, *supra* note 29, at 9-11 (describing theorized female voice traits of "community" and "context" and male voice traits of "individualism" and "rules").

²⁶⁹ See Gruhl, Spohn & Welch, *supra* note 28, at 311, 318-20 (hypothesizing that "women judges would be slightly more lenient than men judges," but actually finding little difference in sentencing behavior, although female judges were somewhat more likely to sentence female convicts to prison). Interestingly, Sherry fits Justice O'Connor's conservative approach to criminal issues into her feminine paradigm by asserting that this is evidence of a communitarian attitude: "If the community is more important than individual rights, it is quite predictable that Justice O'Connor would be a strong law and order proponent: she will protect the community from crime even at the expense of the individual rights of criminal defendants." Sherry, *supra* note 267, at 604. Whether this desire for community order or, alternatively, a preference for contextual evaluation, both of which Sherry describes as feminine virtues, would take priority in the context of the Sentencing Guidelines is debatable. In any event, the strong emphasis in feminist theory on contextual values versus abstract rules would appear to be poignantly implicated in the context of the Sentencing Guidelines. However, the presence of some doubt about how "different voice" female attitudes cut on the Sentencing Guidelines question may also indicate that feminist or feminine values do not provide a "coherent and consistent core of principles" to guide actual decisionmaking in adjudication. See Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist Judging*, 70 Ind. L.J. 891, 893 (1995) (contending that feminist jurisprudence is insufficiently coherent to direct judges in deciding cases).

²⁷⁰ Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 Notre Dame L. Rev. 886, 893 (1989).

gender-based judging. Moreover, while previous studies have generally involved small numbers of female judges,²⁷¹ our study involved 28 female judges, a reasonably healthy sample.

However, as with most other empirical studies that have found limited support for a different female perspective in judging,²⁷² sex was not a significant variable in our study. Although female judges rejected the constitutionality of the Guidelines at a slightly greater rate than male judges (64% versus 61%), this difference was not statistically significant. Nor did sex emerge as a significant influence in any of the deeper content analyses, in striking contrast to race, as discussed immediately below.²⁷³

Ordinarily, one should be cautious in drawing conclusions from the absence of significance in statistical analysis. Nonetheless, in light of the weak and sporadic findings of correlation between sex and judicial behavior in past studies, and the considerable attention given this subject in prior empirical research, it may be time to render at least a tentative verdict. Whether because gender-based theories of difference are wrong or overstated,²⁷⁴ because the judicial recruitment process selects only women compatible with the views of the appointing president,²⁷⁵ or because "differences between men and women judges

²⁷¹ See, e.g., Gruhl, Spohn & Welch, *supra* note 28, at 313-14 (including seven female judges in study and acknowledging that "findings need to be interpreted with caution"); Walker & Barrow, *supra* note 4, at 602 (including twelve female judges in study and even fewer for certain tests).

²⁷² See *supra* notes 29, 34-35 and accompanying text; see also Ashenfelter, Eisenberg & Schwab, *supra* note 27, at 277-81 (finding that individual judge characteristics, including sex, did not appear to substantially influence mass of cases decided by district court judges). But see Davis, Haire & Songer, *supra* note 28, at 131-32 (finding female judges more supportive of claimants in employment discrimination cases, although when controlled for party of appointing President, variance declined and, for Republican-appointed judges, disappeared); Walker & Barrow, *supra* note 4, at 604-11 (finding that female judges were more deferential to positions taken by government in personal right and economic regulations cases).

²⁷³ See *infra* Part V.A.2.

²⁷⁴ See Davis, Haire & Songer, *supra* note 28, at 133 (suggesting possible reasons for absence of differences in judging between male and female judges).

²⁷⁵ See Walker & Barrow, *supra* note 4, at 615 (suggesting that common socialization experiences of legal education and screening of selection process may mute gender differences). But see Sheldon Goldman, Carter's Judicial Appointments: A Lasting Legacy, 64 *Judicature* 344, 351-52 (1981) (finding President Carter's women appointees to federal bench were less likely to have been political activists and less likely to have had prior judicial experience); Elaine Martin, Women on the Federal Bench: A Comparative Profile, 65 *Judicature* 306, 310 (1982) (finding "several marked differences" in backgrounds of women recently appointed to federal bench, including that they were "far more likely to have been judges at the time of their appointment, far less likely to have been working for a large corporate law firm, and much less likely to have been party activists"); Elliott E. Slotnick, The Paths to the Federal Bench: Gender, Race and Judicial Recruitment Variation, 67 *Judicature* 371, 378-88 (1984) (finding distinctively different paths to federal bench

are neutralized by the very nature of law and legal process,”²⁷⁶ “[t]he weight of the evidence demonstrates that most female judges do not decide cases in a distinctively feminist or feminine manner.”²⁷⁷ We believe our results confirm the conclusion of one female judge who, based upon six years experience on the federal bench, said that she had “not seen any basis for believing that gender plays a role one way or the other in any particular judge’s ability or willingness to exercise self-restraint.”²⁷⁸

2. Race

Examination of the possible influence of racial background on judicial behavior remains a standard in empirical research.²⁷⁹ For example, in the general context of criminal law, the thesis has been that African American judges would be more liberal, and that liberal attitudes might make them “more sympathetic to criminal defendants than white judges are, since liberal views are associated with support for the underdog and the poor, which defendants disproportionately are.”²⁸⁰ One of the ostensible purposes of the Guidelines reform was to reduce sentencing disparity, including unjustifiable differences for

for women, including alternative career backgrounds, such as being less likely to have held elective political office, less likely to have been in prominent private practice, and fewer years at bar).

²⁷⁶ Davis, Haire & Songer, *supra* note 28, at 133; see also Fox & Van Sickel, *supra* note 29, at 22 (speculating that “a natural feminine voice may actually be ‘socialized out’ of a woman judge’s behavior over time (of course, this would still not account for the fact that in our study, male judges sometimes displayed feminine voice traits more than did women judges”); Gruhl, Spohn & Welch, *supra* note 28, at 309 (suggesting that gender contrasts may be diluted by “powerful influences of socialization to the legal profession and to the judicial role” and influences of “courtroom ‘workgroups’” such as prosecutors and defense attorneys).

²⁷⁷ Solimine & Wheatley, *supra* note 269, at 919; see also Fox & Van Sickel, *supra* note 29, at 12, 16 (finding, in study of local criminal trial judges, that “there was no clear pattern of women employing ‘feminine voice traits’ and men employing ‘masculine voice traits’” and concluding that results “offer almost no support for the contention that women judges, by definition, bring to the judiciary a philosophy which embodies the feminine voice”). For a fascinating empirical exploration of the “different voice” judging theory involving the study of reasoning in opinions by five federal court of appeals judges, see Davis, *supra* note 150, at 148, 171 (finding that men adopted contextual approaches as often as women and that both chose rule-based approaches more often, thus concluding that results “do not provide empirical support for the theory that the presence of women judges will transform the very nature of the law”). For a future study, the set of written opinions in these Sentencing Guidelines constitutionality cases would provide an excellent source for evaluating the language and approaches used by female and male judges through an empirical model with a good number of women judges and involving the identical case problem.

²⁷⁸ Miriam Goldman Cedarbaum, *Women on the Federal Bench*, 73 B.U. L. Rev. 39, 44 (1993).

²⁷⁹ See *supra* notes 29, 36-37 and accompanying text.

²⁸⁰ Welch, Combs & Gruhl, *supra* note 29, at 127.

defendants of different races.²⁸¹ Commentators have attacked the Guidelines as perpetuating disparate treatment of racial and ethnic minority defendants,²⁸² although these critiques generally arose after

²⁸¹ See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 Hofstra L. Rev. 1, 4-5 (1988) (noting that Congress "relied upon statistical studies" indicating disparities in sentencing across gender and race). Indeed, the Sentencing Reform Act explicitly directs that the Guidelines are to be neutral as to the offender's race, sex, national origin, creed, and socioeconomic status. See 28 U.S.C. § 994(d) (1994).

²⁸² See, e.g., Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 Am. Crim. L. Rev. 161, 204-05 (1991) (concluding that study of Guidelines in four districts demonstrated disparate impact on Hispanic and African American defendants); José Cabranes, *Cabranes Rips Sentencing Rules*, Legal Times, Apr. 11, 1994, at 17 (saying that "members of racial and ethnic minorities continue to fare worse under the guidelines than wealthier non-minorities do") [hereinafter Cabranes, *Rips Sentencing Rules*]. But see Joe B. Brown, *The Sentencing Guidelines Are Reducing Disparity*, 29 Am. Crim. L. Rev. 875, 877-78 (1992) (criticizing Heaney's interpretation of data as failing to account for different categories of offenses). Somewhat ironically, given the charge of continued racial disparity under the Guidelines, a very recent study found that two-thirds of the racial, gender, and economic disparities in federal sentencing are accounted for by the relatively small number of cases involving judicial departures from the Guidelines, rather than differential sentencing within the Guidelines. See David B. Mustard, *Racial, Ethnic and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts* 17-20 tbl.6 (1998) (unpublished manuscript on file with the *New York University Law Review*).

In addition, the Sentencing Guidelines, or more accurately, the underlying mandatory minimum sentence statutes, have been attacked as racially biased due to the heavier penalties imposed for possession with intent to distribute crack cocaine (more prevalent in minority communities) than powdered cocaine (more prevalent in white communities). See Randall Kennedy, *Race, Crime, and the Law* 364-86 (1997) (discussing race and differences in sentencing for crack cocaine versus powder cocaine); Paul Butler, *(Color) Blind Faith: The Tragedy of Race, Crime, and the Law*, 111 Harv. L. Rev. 1270, 1276-79 (1998) (criticizing Randall Kennedy's analysis and characterizing sentencing disparity for crack versus powder cocaine as racist); see also David H. Angeli, *A "Second Look" at Crack Cocaine Sentencing Policies: One More Try for Federal Equal Protection*, 34 Am. Crim. L. Rev. 1211, 1213 (1997) (reporting that, in 1993, blacks accounted for 88.3% of federal crack cocaine distribution convictions (while 4.1% were white), but only 27.4% of those convicted of powder cocaine distribution (while 32% were white)) (citing United States Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (1995)). However, while the first federal sentencing statute imposing harsher penalties for trafficking in crack cocaine was enacted in 1986, see *Anti-Drug Abuse Act of 1986*, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended in scattered sections of 18, 21, 31 U.S.C.), the controversy concerning the racially disparate effect of this differential did not flare up until after the Sentencing Guidelines crisis and thus likely would not have affected attitudes toward the Guidelines during the period relevant for this study. See generally Kennedy, *supra*, at 364-80, 459-60 nn.39-44 (discussing and citing scholarly, media, and judicial treatment of crack versus powder cocaine differential in sentencing and disparate racial impact, which illustrate greater attention to issue arising around 1993 with a few earlier treatments dating to 1991). Indeed, as Randall Kennedy notes, about half of the members of the Congressional Black Caucus voted in favor of the law in 1986. See *id.* at 301. In any event, the crack versus powder cocaine differential is really more a consequence of statutory minimum sentences than of the Guidelines themselves. Indeed, in 1995, the Sentencing Commission recommended that Congress narrow the differences in sentencing for crack versus powder cocaine possession and distribution and proposed

the period of constitutional challenges that we examine. The greater severity of reform sentences for drug offenses had a predictably greater impact on minority communities.²⁸³ Although it is unclear whether the alleged negative effect of guideline sentencing on minority populations was recognized at the time of the constitutionality decisions in 1988,²⁸⁴ by 1993 a leading federal judge could say that he knew "of no federal trial judge from a minority group who could be counted as a supporter of the federal guidelines."²⁸⁵

For the most part, prior empirical research has failed to support the claim that minority judges "have assumed a strong advocacy role on behalf of any racial[ly] . . . based interests."²⁸⁶ Studies of trial judges in the very context of criminal cases and criminal sentencing have uncovered very little variation in the behavior of judges based upon race.²⁸⁷ For that reason, researchers have postulated that legal or judicial socialization or the judicial recruitment process "screen[s] out those candidates with unconventional views."²⁸⁸ Of course, an alternative explanation would be that race is not a driving force for judi-

amendments to the Sentencing Guidelines equalizing "sentences for offenses involving similar amounts of crack cocaine and powder cocaine." United States Sentencing Commission, Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25,074, 25,076 (1995). However, Congress passed and President Clinton signed a bill disapproving these proposals. See Federal Sentencing Guidelines, Amendment, Disapproval, Pub. L. No. 104-38, 109 Stat. 334 (1995).

²⁸³ See Paula C. Johnson, *At the Intersection of Injustice: Experiences of African American Women in Crime and Sentencing*, 4 Am. U. J. Gender & L. 1, 41-42 (1995). But cf. Kennedy, *supra* note 282, at 8-12, 21-24, 351-86 (disputing charge that disproportionate criminal prosecution and punishment of blacks for drug and other offenses reflect impermissible racial discrimination, and observing that, relative to their percentage of population, blacks both commit more and are more likely to be victims of street crime, thus leaving lawabiding black citizens in "dire need of protection against criminality").

²⁸⁴ None of the written opinions on the constitutionality of the Sentencing Guidelines included in our study mentioned disparate racial impact as an issue.

²⁸⁵ Cabranes, *Rips Sentencing Rules*, *supra* note 282, at 17.

²⁸⁶ Walker & Barrow, *supra* note 4, at 614.

²⁸⁷ See, e.g., Manning, *supra* note 29, at 6; Spohn, *supra* note 29, at 1211-14; Uhlman, *supra* note 29, at 891-94; Walker & Barrow, *supra* note 4, at 613-15; Welch, Combs & Gruhl, *supra* note 29, at 131-35. The one exception appears to be a study of federal appellate judges, see Gottschall, *supra* note 29, at 171-73 (finding pronounced disparity in voting by black and white judges in criminal cases).

²⁸⁸ Spohn, *supra* note 29, at 1212. See *id.* (suggesting that judicial socialization "produces a subculture of justice and encourages judges to adhere to prevailing norms, practices, and precedents" (citation omitted)); Uhlman, *supra* note 29, at 885 (suggesting that "atypically successful pre-judicial careers, a rigorous process of legal socialization, and special scrutiny for highly visible black jurists may attenuate the uniqueness of [a minority judge's] role" (citations omitted)); Walker & Barrow, *supra* note 4, at 615 (suggesting that judicial selection screening may mute differences among minority judges).

cial behavior, that is, that in most cases "the law—not the judge—dominates the outcome."²⁸⁹

In our study, although minority judges invalidated the Guidelines by a larger percentage than white judges (71% versus 60%),²⁹⁰ this difference was not statistically significant. Indeed, the RACE variable does not approach significance in any of the multiple phases of our study, with one powerful exception. Among those judges who addressed the claim that due process guarantees a defendant's right to an individualized sentence imposed by a judge with full discretion, RACE emerged as significant at the 99% probability level (Table 10). With respect to this claim, RACE dramatically reduced the probability of a positive constitutional ruling.²⁹¹ Whereas 58% of all

²⁸⁹ Ashenfelter, Eisenberg & Schwab, *supra* note 27, at 277-81 (finding that individual judge characteristics, including race, did not appear to influence mass of cases decided by district court judges).

²⁹⁰ Of the 28 minority judges in our study—a relatively healthy sample in comparison with many prior studies—20 (71%) invalidated the Guidelines and 8 (29%) upheld the Guidelines.

²⁹¹ The odds multiplier for RACE on the Due Process individualized sentencing issue is .02. The odds multiplier, a standard way of measuring the size of a variable's influence, is obtained by taking the antilog of the regression coefficient. See David W. Hosmer, Jr. & Stanley Lemeshow, *Applied Logistic Regression* 40-41 (1989). The regression coefficients for each independent variable are reported in the tables for this study. An odds multiplier greater than 1.0 indicates that the variable's presence, holding other variables constant, increases the chance of a positive outcome on the dependent variable. An odds multiplier of less than 1.0 indicates that the presence of the variable reduces the chance of a positive outcome on the dependent variable. See Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 Cornell L. Rev. 1124, 1146 (1992); Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 Colum. L. Rev. 199, 243 n.134 (1997). The greater the distance from 1.0 in either direction, the more sizable the positive or negative influence of the variable.

However, a "change in the 'odds' does not translate directly into a change in the probability that the outcome would occur." Merritt & Reskin, *supra*, at 243 n.134; see also Clermont & Eisenberg, *supra*, at 1146 n.54 (discussing difference between "odds" and "probability"). For statisticians, "[t]he odds of an event occurring are defined as the ratio of the probability that it will occur to the probability that it will not." Marija J. Norusis, *SPSS Advanced Statistics User's Guide* 49 (1990). Thus, when applying the odds multiplier as a measure of the size of influence of a variable, "[t]he magnitude of the impact on probability depends on the initial odds." Merritt & Reskin, *supra*, at 243 n.134. In other words, we must first determine the initial odds ratio based upon the probabilities of the event occurring and not occurring, apply the odds multiplier to those initial odds, and then translate the increased or decreased odds into a probability percentage. See, e.g., *id.* at 257 n.178 (applying odds multiplier and translating result into probability); Norusis, *supra*, at 49-50 (applying odds multiplier).

With respect to the Due Process Claim dependent variable, 42% of judges ruling upon this issue sustained the constitutionality of the Guidelines; thus, the "odds" of a ruling upholding the Guidelines were approximately .72 (.42 divided by .58). As the odds multiplier for the RACE variable is .02, the odds of a ruling sustaining the constitutionality of the Guidelines were decreased in the presence of this independent variable to approximately .01 (.02 multiplied by .72). These odds are equivalent to a probability of approxi-

judges addressing the due process claim invalidated the Guidelines on this basis, 90% of the minority judges did so (9 out of 10 nonwhite judges in this category).²⁹²

The due process theory was a somewhat irregular approach to the Sentencing Guidelines constitutionality question. Although a majority of the judges who actually addressed the due process issue accepted the individualized sentencing claim, the vast majority of judges striking down the Guidelines chose to ground their rulings on separation of powers theories.²⁹³ Of the 179 judges who struck down the Guidelines as unconstitutional, only 42 relied on the Due Process Clause to do so. Moreover, the legal basis for the claim was weak, even "absurd," in the minds of some.²⁹⁴ Indeed, pluralities of the Supreme Court a decade prior had recited that, outside of death penalty cases, the prevailing practice of individualized sentencing was a matter of legislative policy, not constitutional command.²⁹⁵ Although the Supreme Court did not address the due process claim in its *Mistretta v. United States*²⁹⁶ opinion, every court of appeals subsequently rejected it.²⁹⁷

mately 1%. Thus, holding all other variables constant, the RACE variable reduces the probability of a positive constitutionality ruling on the Due Process Claim from 42% to 1%.

²⁹² The small number of minority judges in this sample (10) suggests some caution is due in evaluating this finding or generalizing from it. However, we do note that prior empirical studies of the influence of race on the behavior of judges also have involved relatively small numbers of minority judges. See Spohn, *supra* note 29, at 1200 (describing study as involving 13 black and 25 white judges); Uhlman, *supra* note 29, at 886 (contrasting judicial performance of 16 black and 75 white judges); Welch, Combs & Gruhl, *supra* note 29, at 129 (describing data as including decisions made by 10 black judges and 130 white judges).

²⁹³ A judge striking the Guidelines as unconstitutional on one theory did not need to address other challenges raised by the defendant, although some judges relied on multiple constitutional grounds to invalidate the Guidelines. See *supra* Tables 5, 6. Thus, not all of the judges addressed all four of the constitutional claims outlined in Part II.B.1. See *supra* Tables 5, 6 and accompanying text.

²⁹⁴ See, e.g., Fried, *supra* note 82, at 165 & 239 n.61 (describing due process ruling in *United States v. Bolding*, 683 F. Supp. 1003 (D. Md. 1988), *rev'd*, 876 F.2d 21 (4th Cir. 1989), as example of "absurd" ground for constitutional challenge to Guidelines, as contrasted with serious separation of powers grounds).

²⁹⁵ See *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978) (plurality opinion) (stating that "in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes"); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion) (stating that "the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative").

²⁹⁶ 488 U.S. 361 (1989).

²⁹⁷ For court of appeals decisions rejecting the due process individualized sentencing challenge to the Guidelines, by order of circuit, see *United States v. Doe*, 934 F.2d 353, 356-57 (D.C. Cir. 1991); *United States v. Sanchez*, 917 F.2d 607, 614-15 (1st Cir. 1990); *United States v. Vizcaino*, 870 F.2d 52, 53-56 (2d Cir. 1989); *United States v. Frank*, 864 F.2d 992, 1008-10 (3d Cir. 1988); *United States v. Bolding*, 876 F.2d 21, 22-23 (4th Cir.

Thus, our findings confirm a tendency of minority judges to adopt a nonmainstream approach, even if these judges reached the same general outcome at basically the same rate as white judges. Indeed, the very fact that the outcome votes of minority judges were not significantly different, while the reasoning of those judges varied substantially, suggests that prior research focusing on outcome and ignoring reasoning may have neglected underlying evidence of influence. Moreover, the influence was in the direction hypothesized, that is, a greater willingness to accept a theory that promoted the rights of criminal defendants. Still, the significance of race in a reasoning category rather than at the outcome level suggests caution in weighing the importance of race as a factor in judicial behavior. While our findings provide support for the conclusion that minority judges are more willing to experiment with alternative theories, including theories that support the claims of those that many would describe as disadvantaged (i.e., criminal defendants), the effect appears only at the margins. In other words, the RACE variable appears to affect the *method* but not the *ends* of judging, at least in the context of our study. Thus, while racial background has some impact, our study does not directly support an ideological theory of race-based *judging* as a predictor of *outcomes*.

3. Age

Although early studies found a judge's age to be significant,²⁹⁸ even the best variable in accounting for variance in decision outcomes,²⁹⁹ more recent empirical studies have seldom found age to be of value in explaining judicial behavior.³⁰⁰ The thesis is that age should "correlate positively with any question regarding the status quo."³⁰¹ As Oliver Wendell Holmes colorfully framed the hypothesis,

1989); *United States v. White*, 869 F.2d 822, 825 (5th Cir. 1989); *United States v. Jacobs*, 877 F.2d 460, 461-62 (6th Cir. 1989); *United States v. Pinto*, 875 F.2d 143, 144-45 (7th Cir. 1989); *United States v. Blackman*, 897 F.2d 309, 318 (8th Cir.), aff'd on reh'g, 904 F.2d 1250, 1258-59 (8th Cir. 1990); *United States v. Brady*, 895 F.2d 538, 543-44 (9th Cir. 1990); *United States v. Thomas*, 884 F.2d 540, 542-43 (10th Cir. 1989); *United States v. Erves*, 880 F.2d 376, 379 (11th Cir. 1989). See generally McCall, *supra* note 167, at 490-92 & n.129.

²⁹⁸ See Ulmer, *supra* note 33, at 625 (finding three factors—age at appointment, federal administrative experience, and religious affiliation—to have some explanatory value for decision variance in sample of 14 United States Supreme Court justices).

²⁹⁹ See Goldman, *supra* note 28, at 498-506 (finding age variable statistically significant and, along with party affiliation, best in accounting for variance in decisions on political measures by court of appeals judges).

³⁰⁰ See Gryski & Main, *supra* note 27, at 532-36 (finding chronological age significant in one model but not holding significance through multivariate analysis).

³⁰¹ Beverly Blair Cook, *Sentencing Behavior of Federal Judges: Draft Cases—1972*, 42 U. Cin. L. Rev. 597, 623 (1973).

"[j]udges commonly are elderly men, and are more likely to hate at sight any analysis to which they are not accustomed, and which disturbs repose of mind, than to fall in love with novelties."³⁰²

Since age of the judge competed in terms of multicollinearity with seniority on the bench in our study, we were unable to include both in a single regression. Because we concluded there was a stronger theoretical basis for including seniority, as discussed below,³⁰³ and because age has proven to be of little significance in recent empirical studies of judicial behavior, we selected seniority over age for our standard set of variables. However, we did conduct an alternative regression analysis with the variable AGE³⁰⁴ substituted for SENIORITY,³⁰⁵ which confirmed an absence of significance.³⁰⁶

4. Region

Although the South has been somewhat distinctive with respect to certain matters, such as racial equality,³⁰⁷ geographic regions in the United States are becoming more similar, at least judicially.³⁰⁸ In the most comprehensive empirical study of federal district judges to date, Rowland and Carp found that while sectional differences do still exist, regional variations for judicial behavior have markedly declined.³⁰⁹ That decline is particularly marked in criminal cases.³¹⁰ Rowland and Carp attribute the change to a more national ideological cast to judi-

³⁰² Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 Harv. L. Rev. 443, 455 (1899).

³⁰³ See *infra* Part V.D.3.

³⁰⁴ For this AGE variable, each judge's age was recorded by a whole number for number of years. For convenience, we simply subtracted the judge's year of birth from the year 1988 (i.e., for a birthdate of 1946, the number to be recorded would be 42).

³⁰⁵ Documentation for these and other alternative analyses mentioned in this study but not reported in the tables is available from the authors.

³⁰⁶ Not only was age not significant when included in an alternative regression on the outcome dependent variable, but inclusion of this variable in the set did not substantially affect the correlations of the other variables with the dependent variable. In particular, the signs of the coefficients remained unchanged, and no variable that was insignificant in the standard set analysis emerged as significant. The only variable that was significant in the standard set but insignificant in the alternative analysis (PROMO-POT) slipped just below significance at the 95% probability level. Indeed, the consistency of the alternative sets tends to confirm the collinearity of AGE and SENIORITY as variables.

³⁰⁷ Cf. Jack Bass, *Unlikely Heroes: The Dramatic Story of the Southern Judges of the Fifth Circuit Who Translated the Supreme Court's *Brown* Decision into a Revolution for Equality* (1981).

³⁰⁸ See Tate & Handberg, *supra* note 26, at 467 (suggesting political orientations of American geographic regions likely have become more similar).

³⁰⁹ See Rowland & Carp, *supra* note 39, at 58-61, 85 (observing "that in aggregate, variations between judges in the North and South have markedly declined since 1977 although they are still to be found for some specific case types").

³¹⁰ See *id.* at 63-65 (noting that, in category of criminal cases, variation between Northern and Southern judges dropped dramatically after 1977).

cial appointments since 1977 and a corresponding weakening of influence by home state senators and local political party bosses in the selection of district court judges.³¹¹

For two reasons, we chose not to include regional variables in our standard set. First, studies of judicial behavior have found geographic region to be of greatly diminishing significance. Second, little, if anything, about the Sentencing Guidelines constitutionality question recommends it as a legal issue that might interact with regionality in any coherent or meaningful manner.

However, in an effort to be complete and to explore alternative possibilities, we did conduct an alternative analysis using regional variables.³¹² In logistical regression analysis of the outcome dependent variable, regional variables neither approached significance³¹³ nor did their inclusion materially affect other results.³¹⁴ Accordingly, we feel comfortable concluding that the geographic region to which a district judge is assigned is not an explanatory factor in resolution of the constitutional challenges to the Guidelines.

5. *Crime Rate*

A judge's resolution of a pending criminal case might be influenced by the judge's perception of the crime problem in the community. Because we were unable to effectively construct a crime rate measure for each judge's particular city due to missing data for an excessive number of judges,³¹⁵ we adopted as the best alternative the

³¹¹ See *id.* at 66, 85; see also Sheldon Goldman, *Picking Federal Judges: Lower Court Selection from Roosevelt Through Reagan* 361 (1997) (stating that his comprehensive study "suggests that presidential agendas and judicial selection are intimately tied and that the policy agenda tends to predominate in times of political realignment").

³¹² Each judge was assigned to one of four geographical regions, based on the judge's district, NORTHEAST, MIDWEST, SOUTH, and WEST. See Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics-1994*, at 625-26 app. 3 (1995).

³¹³ Although the regional variables were found to be statistically significant at the 95% probability level in an exploratory chi-square analysis, this result warrants relatively little weight given the inherent limitations of chi-square analysis and the superiority of regression analysis in measuring the influence of independent variables.

³¹⁴ Not only was region not significant when included in an alternative regression analysis, but addition of this variable to the alternative set did not substantially affect the correlations of the other variables with the dependent variable: the signs of the coefficients remained stable, only one variable that was significant in the standard set (PREC-CIR) moved out of significance, and no variables that were not significant in the standard set became significant. The consistent significance of PREC-CIR in nearly all other alternative analyses with substitute sets of variables independently confirms the significance of that variable. Thus, our standard set is not meaningfully biased by the omission of regional variables.

³¹⁵ In a separate regression analysis, which is not reported in Table 4, we substituted the Crime Index for the Metropolitan Statistical Areas for each judge for whom we had information. Because of missing data, particularly for the states of Illinois and Florida, the N

total crime rate index for the state (the variable CRIME-RATE).³¹⁶ This index is not constructed from federal crimes and thus does not directly gauge the criminal caseload of federal district judges, for which we developed a separate set of variables.³¹⁷ However, and more importantly for this particular variable, the crime index should generally indicate the rate of visible violent and property crime and thus presumably the judge's sense of personal safety and of the risk of crime.

One thesis was that a judge in a state with a higher crime rate would view criminal behavior as a problem requiring more severe measures, and thus be more likely to approve the strict and severe Sentencing Guidelines. A prior study, including analysis of crime rates in various counties, suggested that state trial judges indeed were moved toward harsher sentencing behavior by concern over crime in the jurisdiction.³¹⁸

On the basic outcome question, crime rate did not significantly correlate with either a positive or a negative decision on the constitutionality of the Sentencing Guidelines. Nor was crime rate a significant factor in assessing the basic validity of the Guidelines on any particular constitutional theory.

Our crime rate variable emerged as significant only in one part of the study where its presence makes little or no sense. As reported in Table 7, CRIME-RATE was significant at the 95% probability level when the dependent variable was receptivity of judges to the Justice Department's argument that judges could disregard the statutory assignment of the Commission to the judicial branch and regard it as an executive branch agency.³¹⁹ Although the crime rate variable was retained in the set of independent variables in this part of the study for consistency and stability reasons, we can conceive of no relationship

was reduced from 291 to 240, which is why we concluded this crime rate measure was unacceptable for our study. In any event, in this alternative regression analysis, the Crime Index for Metropolitan Statistical Areas did not approach significance on the outcome dependent variable.

³¹⁶ See *supra* Part III.A (discussing CRIME-RATE variable).

³¹⁷ See *supra* Part III.D.2 (discussing CASELOAD and CRIM-CASELOAD variables).

³¹⁸ See James L. Gibson, *Environmental Constraints on the Behavior of Judges: A Representative Model of Judicial Decision Making*, 14 *L. & Soc'y Rev.* 343, 358-60 (1980) (finding that "incidence of crime does indeed influence judges' decisions, accounting for approximately one-sixth of the variance in sentencing behavior"). By contrast, another study of federal district judges found a slight correlation between higher crime rates for a city and milder sentences. See Cook, *supra* note 301, at 611. However, this study is limited because it examined only sentencing for military draft offenders. One might expect judges in high crime urban areas, when confronted with the basically passive misconduct of failure to comply with military conscription laws, to view them less seriously for sentencing purposes in comparison with more familiar and disturbing violent and property crimes.

³¹⁹ See *supra* Table 7, Column 2.

between the amount of crime in a judge's state and that judge's view of the proper branch location for the Sentencing Commission.

6. Law School Education

Justice Frankfurter once opined that "the law is what the lawyers are. And the law and lawyers are what the law schools make them."³²⁰ Law school faculties in general,³²¹ and those at the leading law schools in particular,³²² are ideologically unrepresentative of the general population and tend to be identified with liberal causes and attitudes. A study of federal appellate judges found that most self-identified "innovators" (those judges more comfortable with judicial lawmaking), had attended prestigious law schools, while most "interpreters" had not.³²³

Given the particular context of this study, our data do not offer an opportunity to directly test support for the hypothesis that the ex-

³²⁰ Letter from Felix Frankfurter, Professor, Harvard Law School, to Mr. Rosenwald 3 (May 13, 1927) (Felix Frankfurter Papers, Harvard Law School library), quoted in Rand Jack & Dana Crowley Jack, *Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers* 156 (1989). But see James J. White, Letter to Judge Harry Edwards, 91 Mich. L. Rev. 2177, 2188 (1993) (stating that "[w]ith characteristic arrogance, Justice Frankfurter exaggerates the role of law schools in 'making law and lawyers'" and arguing that law professors "have a modest influence on the students and an even more limited impact on the law").

³²¹ See Neal Devins, *The Interactive Constitution: An Essay on Clothing Emperors and Searching for Constitutional Truth*, 85 Geo. L.J. 691, 704 n.92 (1997) (reporting that 80.4% of law professors are Democrats, compared with 46.2% of full-time working population (citing James Lindgren, *Measuring Diversity*, Speech to the National Association of Scholars (Jan. 5, 1997))); Michael Stokes Paulsen, *Reverse Discrimination and Law School Faculty Hiring: The Undiscovered Opinion*, 71 Tex. L. Rev. 993, 1001 (1993) (observing "the lack of conservative legal scholars on [law school] faculties and the hugely disproportionate percentage of faculty members who are political Democrats"); Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 U.C.L.A. L. Rev. 2059, 2073 n.23 (1996) (reporting that 12.9% of law professors are Republicans, compared with 41.0% of working population (citing James Lindgren, *Measuring Diversity* tbl.2 (unpublished manuscript))); see also Romer v. Evans, 116 S. Ct. 1620, 1637 (1996) (Scalia, J., dissenting) (contrasting "views and values of the lawyer class" on homosexuality, as evidenced by "law-school view" that disapproval of homosexuality is prejudice that must be "stamped out," with "the more plebeian attitudes" of members of Congress who have declined to extend federal civil rights laws to homosexuals).

³²² See Richard A. Posner, *Legal Scholarship Today*, 45 Stan. L. Rev. 1647, 1652 (1993) (stating that "faculties of the leading American law schools are now substantially to the left of the judiciary . . . and of the public at large"); Christopher Wolfe, *The Ideal of a (Catholic) Law School*, 78 Marq. L. Rev. 487, 503 (1995) (stating that "political conservatives and traditional religious believers are . . . little represented at 'big-name' law schools"). Nor is this a new phenomenon. See Joan Chalmers Williams, *At the Fusion of Horizons: Incommensurability and the Public Interest*, 20 Vt. L. Rev. 625, 628 (1996) (describing Yale Law School as "a center of liberal thought" in 1930s and 1940s, with many professors playing central roles in New Deal).

³²³ See Howard, *supra* note 30, at 167-68.

posure of law students to teachers at the elite law schools emboldens their graduates toward a more activist view of judicial powers, including a greater willingness to declare statutes unconstitutional. Indeed, leading conservative jurists identified with judicial restraint, including Justice Scalia,³²⁴ also voted to invalidate the Sentencing Guidelines on constitutional grounds. As discussed further below with respect to political/ideological variables,³²⁵ the partisan or ideological implications of this discrete constitutional dispute are murky. Perhaps reflecting this ideological ambiguity, elite law school attendance was not an explanatory factor with respect to either the general outcome on the Guidelines constitutionality question or with any of the constitutional theory dependent variables.

In fact, elite law school education was statistically significant only with respect to one discrete aspect of the study—practical versus theoretical reasoning. Curiously, attendance at an elite law school was associated with a tendency toward *practical* reasoning, rather than the kind of theoretical dissertation that we anticipated from exposure to an elite law school education. As reported in Table 11, the association for the variable LAW-SCHOOL is significant at the 95% probability level and substantially affects the probability of adoption of practical reasoning.³²⁶

As we acknowledged earlier,³²⁷ we harbored some doubt about the objectivity of our coding for practical versus theoretical reasoning, particularly a concern that an opinion that was more detailed in description might be coded as practical despite not insubstantial theoretical content. In other words, our coding for practicality may have been over-inclusive. To the extent that this error was introduced in our coding, one possible interpretation of this finding would be that graduates of elite law schools are more likely to be comprehensive and exhaustive in opinion writing. Nevertheless, while the evidence may not clearly demonstrate a greater disposition toward practical reasoning, it does suggest a decreased affinity toward the opposite,

³²⁴ See *Mistretta v. United States*, 488 U.S. 361, 413-27 (1989) (Scalia, J., dissenting); see also *supra* notes 134-40 and accompanying text (discussing Scalia's dissent in *Mistretta*).

³²⁵ See *infra* Part V.B.

³²⁶ The odds multiplier for the variable LAW-SCHOOL on the Practical dependent variable is 4.21, one of the higher values for significant variables derived in our study. For a discussion of the odds multiplier, see *supra* note 291. With respect to the Practical dependent variable, 34% of judges were coded as using practical reasoning, see *supra* Table 5; thus the odds of practical reasoning for the universe of judges were approximately .52 (.34 divided by .66). As the odds multiplier for LAW-SCHOOL is 4.21, the odds of use of practical reasoning were increased by the presence of this variable to approximately 2.19 (4.21 multiplied by .52). Thus, holding all other variables constant, the LAW-SCHOOL variable increased the probability of use of practical reasoning from 34% to 69%.

³²⁷ See *supra* note 249.

i.e., an opinion dominated by theoretical analysis. In sum, this finding undermines the hypothesis that judges educated at elite law schools are more attracted toward conceptual reasoning than judges educated at nonelite schools.

B. Political/Ideological Variables

Previous empirical studies of judges' attributes have consistently found political party to be an explanatory factor for variances in judicial behavior.³²⁸ For our study, we focused upon the party of the appointing president rather than the party of the individual judge, because prior studies indicate that the more useful proxy for ideology is the identity of the appointing president.³²⁹ Moreover, because more than 90% of federal judges are of the same party as the appointing president,³³⁰ party of appointing president and party of judge compete and cannot be used in the same statistical analysis. For these reasons, and because that information is more readily and fully available than the individual party affiliation of each judge, we adopted that measure as the variable PARTY for our study.

It is difficult to "tag" the Sentencing Guidelines dispute ideologically, particularly at the outcome level. On the one hand, the Reagan Administration Justice Department offered a somewhat schizophrenic defense of the Sentencing Commission,³³¹ arguing that the Commission was unconstitutional in the judicial branch but could be saved by relocation to the executive branch.³³² In constitutional litigation, the

³²⁸ See *supra* notes 38-47 and accompanying text.

³²⁹ See Scherer, *supra* note 43, at 5 (stating that "there is a large body of literature which demonstrates that Presidents appoint judges who reflect their own political ideology"); see also Rowland & Carp, *supra* note 39, at 183-84 (finding that with Carter and Reagan appointees, differences between judges of same and opposite political party appointed by same President "have virtually disappeared"); Revesz, *supra* note 39, at 1718-19 (studying "the impact that a judge's ideology, using as a proxy the views generally held by the party of the appointing President, has on judicial decisionmaking" (footnote omitted)).

³³⁰ See Robert A. Carp & Ronald Stidham, *Judicial Process in America* 237, 241 (3d ed. 1996).

³³¹ See Fried, *supra* note 82, at 165 (saying that "[i]n their heart of hearts I suspect [the Justice Department's Office of Legal Counsel] felt the [Sentencing Reform] Act was unconstitutional, and they were willing to see a defense go forward only on the most limited terms"); Douglas W. Kmiec, *The Attorney General's Lawyer* 79 (1992) (agreeing that he, as Assistant Attorney General in Department of Justice, was more concerned with constitutional separation of powers questions than with uniformity of sentences). One of the authors of this study was a member of the Department of Justice litigation team defending the Guidelines and participated in several of the meetings in which the Department's position was developed. He confirms the accuracy of Fried's and Kmiec's accounts and agrees with their perception of the internal debate over whether and how to defend the Guidelines while maintaining the Administration's strict view of separation of powers.

³³² See *supra* notes 86-89, 92 and accompanying text; see also Fried, *supra* note 82, at 165 (saying that as far as Department of Justice "was concerned, the guidelines would be

Reagan Administration had consistently advanced “a vision about the arrangement of governmental power: [T]he authority and responsibility of the President should be clear and unitary.”³³³ A judicial branch entity with the power to issue general and substantive rules of criminal punishment plainly transgressed the Administration’s strict view of separation of powers. Thus, one might have anticipated greater reluctance on the part of Republican or at least Reagan judicial appointees to approve the Sentencing Commission on separation of powers grounds, as indeed demonstrated by the rejection of the Guidelines by such stalwart conservative jurists (and Reagan appointees) as Justice Scalia and Judge Kozinski.³³⁴

On the other hand, even though divided in its approach, the government did defend the Guidelines in court. The Sentencing Reform Act was a bipartisan initiative that passed overwhelmingly in Congress, had been advocated by the Justice Department, and was signed by President Reagan.³³⁵ In the 1988 presidential campaign, which was being fought simultaneously with the Guidelines battle, both candidates were on record as supporting the Sentencing Commission.³³⁶

Given this ambiguity about the political pedigree of the Sentencing Commission and its Guidelines, it is perhaps not surprising that our study found no significant variance between Republican- and Democrat-appointed judges on constitutional validity.³³⁷ Given the prospect that judges appointed by certain presidents might demonstrate tendencies one way or another—such as President Reagan’s appointees being more skeptical of the Guidelines for separation of powers reasons described above or President Nixon’s appointees being more supportive of the reform as a “get tough on crime” measure³³⁸—we also explored this possible association. In an alternative regression analysis not reported in Table 4, we substituted dummy

defended as an exercise of executive power—in spite of the words of the Act which lodged the Commission in the Judicial Branch—or it would not be defended at all”).

³³³ Fried, *supra* note 82, at 133. See generally *id.* at 132-71; Kmiec, *supra* note 331, at 47-68.

³³⁴ See *Mistretta v. United States*, 488 U.S. 361, 422-27 (1989) (Scalia, J., dissenting) (arguing that Guidelines violate separation of powers); *Gubiensio-Ortiz v. Kanahele*, 857 F.2d 1245, 1251-66 (9th Cir. 1988) (Kozinski, J.) (striking down Guidelines on separation of powers grounds), vacated sub nom. *United States v. Chavez-Sanchez*, 488 U.S. 1036 (1989); see also *supra* notes 113-14; *supra* notes 134-40 and accompanying text.

³³⁵ See Fried, *supra* note 82, at 161-62; Cohen, *supra* note 21, at 185.

³³⁶ See Cohen, *supra* note 21, at 195.

³³⁷ See *supra* Table 4.

³³⁸ See *Rowland & Carp*, *supra* note 39, at 47-48 (explaining that Nixon was associated with law-and-order or “get tough on crime” political theme); *Gottschall*, *supra* note 29, at 168 (stating that Nixon focused on criminal issues when making judicial appointments) (citing Jon Gottschall, *Nixon Appointees to the U.S. Courts of Appeals: The Impact of the Law and Order Issue on the Rights of the Accused*, ch. 1 (unpublished Ph.D. dissertation,

variables for the appointing presidents for the general variable of presidential party.³³⁹ In this alternative run, none of the substituted dummy variables emerged as statistically significant.

Some cases are "less openly ideological" than others,³⁴⁰ which may account for the absence of correlation in our study, especially given the incomplete political dichotomy on the Sentencing Commission described earlier. However, even when moving beyond the general outcome level to a dependent variable that more clearly evokes a traditional liberal versus conservative division³⁴¹—the due process claim of a constitutional right to individualized sentencing (Table 10)—no partisan variation arises. Although the general bipartisan support for the Guidelines may have overwhelmed other considerations, one might still expect party or ideology to make a difference at the margins, such as in the special category of due process claims, which fell outside the mainstream approach to the issue taken by most judges.³⁴²

Instead, party affiliation arises in two wholly unexpected quarters. While partisan factors did not influence the general outcome of the constitutionality question, they apparently did make a difference in the means to that end—but in the opposite direction from what we expected. In an alternative regression analysis not reported in Table 7, the dummy variable for Reagan-appointed judges was significantly, substantially, and negatively correlated on the question of the proper location of the Sentencing Commission in the tripartite federal government.³⁴³ Judges appointed by President Reagan were

University of Massachusetts (Amherst)); Scherer, *supra* note 43, at 2 (explaining that Nixon promised to appoint "law and order" judges to federal bench).

³³⁹ The base case, which was not included in the regression run to prevent collinearity, was the combined dummy variable for judges appointed by Truman, Eisenhower, and Kennedy.

³⁴⁰ Ashenfelter, Eisenberg & Schwab, *supra* note 27, at 264 (comparing contract with civil rights cases).

³⁴¹ Prior empirical studies of judicial behavior on an ideological axis have often fastened upon claims of individual rights as illustrating a classic liberal/conservative split. See, e.g., Stidham, Carp & Songer, *supra* note 43, at 19 (describing judicial outcomes as liberal or conservative based on rulings in civil rights and liberties cases); Walker & Barrow, *supra* note 4, at 604 (same).

³⁴² See *supra* notes 293-97 and accompanying text (discussing nonmainstream nature of due process rulings).

³⁴³ The REAGAN dummy variable was significant at the 95% probability level. The odds multiplier was .11. For a discussion of the odds multiplier, see *supra* note 291. With respect to this dependent variable, 9% of judges addressing this issue located the Sentencing Commission in the executive branch; thus the odds of such a ruling were approximately .10 (.09 divided by .91). As the odds multiplier for REAGAN is .11, the odds of a ruling locating the Commission in the executive branch were decreased by the presence of this variable to approximately .01 (.11 multiplied by .10). Thus, holding all other variables

significantly *less* likely to accept the Department of Justice's argument that the Sentencing Commission should be located in the executive branch. Thus, the Reagan administration's "strong executive" separation of powers theory fell on deaf ears among the very district judges appointed by that administration.

Party affiliation also arises on the question of originalist versus nonoriginalist approaches to constitutional interpretation.³⁴⁴ Given the Reagan administration's very public advocacy of an "original intent" approach to interpretation of the Constitution,³⁴⁵ we might have expected a correlation between judges appointed by Republican presidents in general or President Reagan in particular and the adoption of this mode of constitutional reasoning. What we did *not* anticipate was that the correlation would be *negative*. As reported above,³⁴⁶ Republican-appointed judges were significantly less likely to engage in originalist reasoning. When we substituted a dummy variable for judges appointed by President Reagan, as reported above,³⁴⁷ it likewise was negatively associated with originalist reasoning. And both were rather powerful explanatory factors.³⁴⁸

How to explain these peculiar results? With respect to the branch location issue, the Department of Justice's official position was that the Guidelines should be upheld, but only if the statute creating the Commission was rewritten in court to move the entity under the president's authority to the executive branch. Thus, the Department was encouraging judicial creativity to craft a government structure more amenable to it, while Reagan judges were appointed because of their aversion to such judicial activism. In sum, the Reagan administration's simultaneous advocacy of judicial restraint in general and judicial revision of this statute in particular may have worked at cross-

constant, the REAGAN variable decreased the probability of a proexecutive branch ruling from 9% to 1%.

³⁴⁴ See *supra* Table 12.

³⁴⁵ See Kmiec, *supra* note 331, at 17-46; see also Fried, *supra* note 82, at 61 (stating that originalism "almost became the motto of the Meese Justice Department").

³⁴⁶ See *supra* Table 12, Column 1.

³⁴⁷ See *supra* Table 12, Column 2.

³⁴⁸ The odds multiplier on the Originalism dependent variable is .02 for the variable PARTY and .01 for the variable REAGAN. For a discussion of the odds multiplier, see *supra* note 291. With respect to the Originalism dependent variable, 34% of judges were coded as using practical reasoning, see *supra* Table 5; thus the odds of practical reasoning for the universe of judges were approximately .52 (.34 divided by .66). As the odds multiplier for PARTY is .02, the odds of originalist interpretation were decreased by the presence of this variable to approximately .01 (.02 multiplied by .52). As the odds multiplier for REAGAN is .01, the odds of originalist interpretation were decreased by the presence of this variable to less than .01. Thus, holding all other variables constant, the PARTY and the REAGAN variables each decreased the probability of originalist reasoning from 34% to 1%.

purposes. For Reagan-appointed judges, the former may have triumphed over the latter. If Reagan judges were disposed to uphold the Guidelines, they were unlikely to do violence to the statute to do so.

Similarly, the surprising finding with respect to originalist reasoning and Reagan judges may provide a glimpse into partisan influences lurking beneath the surface even at the basic outcome level. An originalist approach to the separation of powers issue that was the centerpiece of this litigation was nearly always fatal to the Sentencing Commission. There is a tight fit between originalist reasoning and a formalist or geometric view of separation of powers that leaves no room for a rulemaking body lodged in the judicial branch.³⁴⁹ Justice Scalia and Circuit Judge Kozinski, two Reagan appointees prominently identified with originalism, voted to invalidate the Guidelines.³⁵⁰ In our study, thirteen of the fourteen judges who followed an originalist approach voted to strike the Guidelines. To state it from the opposite perspective, a judge determined to *uphold* the Guidelines would likely avoid an originalist mode of analysis. (Ironically—or a critic of originalism might say, inevitably³⁵¹—the aversion of Reagan appointees in our study toward originalism suggests that even those presumably disposed toward originalism in the abstract may discard it in practice when it obstructs a preferred result.)

Thus, the “Republican/Reagan appointee equals anti-originalist” finding might indicate a slight tendency of Republican appointees, or at least Reagan appointees, to endorse the Sentencing Guidelines. At least, this is the best explanation, if not interpretation, that we can come up with for this otherwise odd result. In sum, beyond the usual understanding that the null hypothesis cannot be proven by the absence of significant results, the counterintuitive finding at the originalist content analysis stage of our study may suggest that all is not as it first appears even at the outcome stage. The possibility of partisan

³⁴⁹ See Krotoszynski, *supra* note 167, at 418 n.4 (“Formalists believe that the text of the Constitution and the intent of the Framers concerning the proper relationship of the branches (to the extent that their intent can be determined) should control separation of powers analyses.”).

³⁵⁰ See *supra* note 334 and accompanying text.

³⁵¹ See Lawrence B. Solum, *Originalism as Transformative Politics*, 63 *Tul. L. Rev.* 1599, 1622 (1989) (“When one examines the actual practice of constitutional interpretation, it becomes quite clear that self-professed originalists . . . do not always (or even frequently) adhere to originalism as a practical strategy for deciding cases and writing opinions.”); see also Mary Ann Glendon, *Comment*, in Scalia, *supra* note 260, at 95, 112 (stating that during era in which “the notions of principled judging and objective scholarship” have been abandoned by judges and scholars “if textualism, structuralism, and originalism advance, it can be predicted that selective deployment of textualism, structuralism, and originalism will advance as well”).

influence underlying the Sentencing Guidelines decisions cannot be dismissed.

C. Prior Employment Variables

Under a legalistic model, judges are “consciously to wash out the influence of previous political or social experiences that affect everyone’s behavior.”³⁵² By contrast, the behavioral model and proposed revisions of the model assume that, consciously or unconsciously, these influences inevitably affect judicial behavior.³⁵³ Prior empirical research on the influence of social background variables has generally found few satisfactory relationships.³⁵⁴ With prior career activities in mind, Sheldon Goldman expressed doubt that experiences such as being a political candidate or a prosecutor “could be sufficiently uniform to produce approximately the same conditioning experiences for all sorts of people.”³⁵⁵ Although we initially shared that skepticism, our study found nearly every prior employment variable of these judges, with the exceptions of law professor and political experience (and perhaps prosecutorial experience), to be significant in some manner. Whether because of the nature of the Sentencing Guidelines issue in stirring experience and bringing those influences to the surface, the quality of our set of variables, or the greater depth of our study in exploring influences beyond the crude outcome level, the behavioral model finds substantial support in this category of factors.

1. Criminal Defense Lawyer

Together with promotion potential to the court of appeals,³⁵⁶ prior experience as a criminal defense lawyer was the most consistently significant factor in multiple aspects of our study and was consistently negative, that is, increasing the tendency to invalidate the Guidelines. As reported above,³⁵⁷ the DEFENSE variable was signif-

³⁵² Glick, *supra* note 26, at 292.

³⁵³ For example, Rowland and Carp propose a revised model of judicial behavior grounded in social cognition theory of human perception, memory, and interpretation of ambiguous information. See Rowland & Carp, *supra* note 39, at 164-69. Under this theory, human beings (including judges) respond to cues by reference to stored episodic or impressionistic knowledge—memory “schemata” or frames—that may influence behavior without conscious motivation. See *id.* Applying this theory to the Sentencing Guidelines decisions, a judge with prior experience as a criminal defense attorney who observed particular instances of believed injustice in the sentencing of clients might, upon assuming the bench, view sentencing issues through the framework of those personal experiences when interpreting the importance of an element or the meaning of a circumstance.

³⁵⁴ See *supra* notes 27-37 and accompanying text.

³⁵⁵ Goldman, *supra* note 28, at 500.

³⁵⁶ See *infra* Part V.E.

³⁵⁷ See *supra* Table 4, Column 2.

icant at the 95% probability level on the basic outcome issue with an alternative set of variables using a different measure of judge caseload.³⁵⁸ DEFENSE also registers on the dependent variables of "Separation of Powers—Judge Members"³⁵⁹ and "Due Process Claim Rulings."³⁶⁰ With respect to the judge-membership separation-of-powers issue, confidence in the significance of DEFENSE is not only high (at the 99% probability level) but the variable also proves to be a strong explanatory factor.³⁶¹

The consistency and strength of this variable supports the hypothesis that judges from a criminal defense background would resist the new Sentencing Guidelines. As discussed earlier,³⁶² the antipathy of the criminal defense bar toward the Guidelines was powerful and apparent from the beginning. Indeed, if one had inquired *ex ante* which demographic or career group (other than, of course, criminal defendants themselves) would be most aggrieved and offended by the new Sentencing Guidelines regime, the answer would have been obvious—criminal defense attorneys. The attitudes developed in a criminal defense practice appear to have persisted beyond ascension to the federal bench, at least in the context of the Sentencing Guidelines.

³⁵⁸ In addition, on the basic outcome variable, DEFENSE was significant at the 90% probability level on the standard set of variables, see *supra* Table 4, Column 1. On the "Separation of Powers-Branch Location" dependent variable, DEFENSE was also significant at the 90% probability level on the combined outcome subcategory, see *supra* Table 7, Column 1. Although we would not report significance at less than the 95% level as worthy of independent consideration, it does provide some additional support for the consistency of significance of the DEFENSE variable across dependent variable analyses. Even when it did not reach the 95% level, it frequently hovered close by.

³⁵⁹ See *supra* Table 8.

³⁶⁰ See *supra* Table 10.

³⁶¹ The odds multiplier for DEFENSE on the "Separation of Powers-Judge Members" dependent variable is .08. The odds multiplier for DEFENSE on the "Due Process Claim Rulings" dependent variable is even stronger, at .03. For a discussion of the odds multiplier, see *supra* note 291. With respect to the "Separation of Powers-Judge Members" dependent variable, 35% of judges upheld the constitutionality of the Guidelines against this challenge, see *supra* Table 5; thus the odds of a ruling upholding the Guidelines were approximately .54 (.35 divided by .65). As the odds multiplier for DEFENSE is .08, the odds of a ruling sustaining the constitutionality of the Guidelines were decreased by the presence of this variable to approximately .04 (.08 multiplied by .54). Thus, holding all other variables constant, the DEFENSE variable decreased the probability of a positive constitutionality ruling on the Separation of Powers-Judge Members issue from 35% to 4%. With respect to the Due Process Claim dependent variable, 42% of judges deciding this issue upheld the Guidelines, see *supra* Table 5; thus the odds of a ruling upholding the Guidelines against this challenge were approximately .72 (.42 divided .58). As the odds multiplier for DEFENSE here is .03, the odds of a ruling sustaining the Guidelines were decreased to approximately .02 (.03 multiplied by .72). Thus, the DEFENSE variable decreased the probability of a positive constitutionality ruling on the Due Process Claim issue from 42% to 2%.

³⁶² See *supra* notes 82-83 and accompanying text.

Two possible theories, either alternatively or together, can be offered for this apparent influence: First, in contrast to other life experiences and even other legal practices, criminal defense attorneys may be molded by their environment or be distinctive in the convictions that lead them into criminal practice. Either by virtue of self-selection for the work or because of events and encounters in the course of such practice, criminal defense lawyers may develop a distinct shared worldview, at least with respect to the legal system in general and the criminal justice system in particular.³⁶³ Thus, in contrast with or at least to a greater degree than other career tracks, criminal defense practice may be a truly conditioning experience.

Second, the Sentencing Guidelines, and the attendant reshaping of the criminal justice system, may have been uniquely provocative to those with criminal defense backgrounds. Every person, and thus every judge, may encounter certain matters to which the person is peculiarly sensitive or sensitized. Thus, every judge has some characteristic or personal identity that may at some point be directly implicated by the type of case before the court. Under relatively narrow circumstances, personal attributes which are ordinarily submerged within the judicial role emerge and take precedence in behavior.

For example, Sue Davis, Susan Haire, and Donald R. Songer, in a study of federal courts of appeals judges, found no significant differences between male and female judges in behavior, with the striking exception of employment discrimination cases.³⁶⁴ As these researchers suggest, “[w]omen may support plaintiffs in employment discrimination cases because they identify with members of subordinate groups.”³⁶⁵ Or, more personally, female judges may have experienced discrimination in their path to the bench, through life and legal career, and thus “feel a close affinity with those” who have alleged discrimination.³⁶⁶ Similarly, a criminal defense background and the Sentencing Guidelines may be an example of a direct collision of deeply felt

³⁶³ See Daniel C. Richman, *Cooperating Clients*, 56 Ohio St. L.J. 69, 118-19 (1995) (describing “the ideology that sustains some of the most zealous criminal defense lawyers” as “sense of ‘heroism’” against government and suggesting that “the ideologically committed defense lawyer . . . sees the solidarity of the defense bar as a critical counterbalance to overzealous prosecutors”).

³⁶⁴ See Davis, Haire & Songer, *supra* note 28, at 131-32 (noting that significant differences between male and female judges in criminal procedure cases disappeared once control for appointing president’s party was added). But see Gryski & Main, *supra* note 27, at 531-32, 536 (finding sex not to be significant influence in study of state high court judges in sex discrimination cases, although number of female judges was too small for reliable conclusions).

³⁶⁵ Davis, Haire & Songer, *supra* note 28, at 133.

³⁶⁶ *Id.*

convictions drawn from poignant experience and a matter that immediately and pointedly threatens the meaning of that experience.

However, it also bears emphasis that, despite the obvious hostility of the criminal defense bar to the Sentencing Guidelines, and the strength of that background influence on judicial decisions in this context, ten of thirty-nine judges with criminal defense employment backgrounds nonetheless upheld the constitutional validity of the Guidelines. In sum, despite powerful antipathetic feelings by this constituency, a substantial number of judges with this former affiliation felt bound to rule contrary to their presumptive personal preferences.

2. *Government/Political Positions*

a. Prosecutorial Experience. The counterpart to the criminal defense lawyer in the legal system is of course the criminal prosecutor. Thus, just as criminal defense attorneys would have been expected to oppose the new Sentencing Guidelines, prosecutors would have been expected to favor them.³⁶⁷ In his study of a set of Sentencing Guidelines decisions, Cohen found prior occupation as a prosecutor to be significant, but only at the 90% probability level.³⁶⁸

In our study, the variable PROSECUTOR did not approach significance on the basic outcome dependent variable.³⁶⁹ It surfaced, however, in one variation of a parallel dependent variable. As reported above,³⁷⁰ PROSECUTOR is correlated at the 95% probability level with a substantially increased tendency to approve the Sentencing Guidelines against the particular constitutional objection of required judicial membership on the Sentencing Commission.³⁷¹

³⁶⁷ See Cohen, *supra* note 21, at 196 (stating that tendency of prosecutors to uphold Guidelines "could have been anticipated based on the overwhelming support that government prosecutors have expressed for the Commission"); Tate & Handberg, *supra* note 26, at 471 (stating that "prosecutor's job is to look after the legal interests of the government").

³⁶⁸ See Cohen, *supra* note 21, at 196; see also Eisenberg & Johnson, *supra* note 32, at 1190 (finding prosecutorial experience significant at 90% probability level); Nagel, *supra* note 32, at 336 (finding in early study that former prosecutors were significantly more likely to rule against defense in criminal cases); Tate & Handberg, *supra* note 26, at 474-76 (finding prosecutorial experience significant at 90% probability level).

³⁶⁹ See *supra* Table 4.

³⁷⁰ See *supra* Table 8, Column 2.

³⁷¹ The odds multiplier for the PROSECUTOR variable in this alternative analysis (substituting the CRIM-CASELOAD variable for the CASELOAD variable in the standard set) on the "Separation of Powers-Judge Members" dependent variable is the moderately strong 2.46. For a discussion of the odds multiplier, see *supra* note 291. With respect to the Separation of Powers-Judge Members dependent variable, 35% of judges upheld the constitutionality of the Guidelines against this challenge, see *supra* Table 5; thus the odds of a ruling sustaining the constitutionality of the Guidelines were approximately .54 (.35 divided by .65). As the odds multiplier for PROSECUTOR is 2.46, the odds of a ruling

Because this was one of the primary constitutional challenges to the Guidelines,³⁷² and the issue was addressed by the vast majority of judges writing or joining written opinions (170 of 188 judges),³⁷³ this dependent variable could be regarded as a close cousin to the basic outcome variable.

The emergence of this variable only in an alternative analysis and only on a parallel theoretical variable but not on the basic outcome variable—without a consistent and strong explanation for appearance at one point and not the other—decreases our confidence in the explanatory value of this factor.³⁷⁴ Moreover, prosecutorial experience does not emerge as a significant influence in the study with the consistency of such other variables as criminal defense experience. However, our findings provide at least some support for the influence of prosecutorial experience in a criminal case and in the predicted direction.

b. Political Experience. Prior political experience in elected office (other than elected judgeship) or high-level administrative office would presumably make a person “more deferential to governmental bodies.”³⁷⁵ Viewed collectively, then, prior political experience should predispose judges to approve the Sentencing Guidelines, which had been adopted by the political branches with overwhelming bipartisan support. However, in his study of Sentencing Guidelines decisions, Cohen found judges who had served in *elected* public office were significantly more likely to invalidate the Guidelines, while those who had served in *appointed* public office were significantly more

upholding the Guidelines against this challenge were increased by the presence of this variable to approximately 1.33 (2.46 multiplied by .54). Thus, holding all other variables constant, the PROSECUTOR variable increased the probability of a positive constitutionality ruling on the Separation of Powers-Judge Members issue from 35% to 57%.

³⁷² See *supra* notes 93-97 and accompanying text.

³⁷³ See *supra* Tables 5, 6.

³⁷⁴ Prosecutors are accustomed to performing multiple roles—exercising prosecutorial discretion in an almost judicial manner and then serving as advocates once the decision to prosecute is made. This could explain why judges with prosecutorial experience were favorably disposed toward judges performing multiple roles by participating on the Sentencing Commission. However, if judges with prosecutorial experience were indeed more supportive of the Commission’s structure, it is difficult to explain why this positive disposition would not also be reflected in the basic outcome variable. Why would a judge’s strong sympathy toward judicial service on the Commission not translate directly into approval of the Commission’s validity? Moreover, as noted, even on the Separation of Powers-Judge Members dependent variable, PROSECUTOR was significant only on one of two alternative regression runs. Thus, while a possible explanation exists, in part, we are reluctant to promote it strongly.

³⁷⁵ Aliotta, *supra* note 39, at 279; see also Howard, *supra* note 30, at 169 (concluding, based upon interviews with judges, that “[t]he most active former politicians, contrary to lawyers’ myths, did not become judicial activists”).

likely to uphold the Guidelines.³⁷⁶ Given the conflicting directions of influence that Cohen found for prior elective versus prior appointive public office, it is perhaps not surprising that our composite political experience variable with officials of both types—POLITICAL—did not register as significant with any set of independent variables or on any dependent variable in our study.

To more closely replicate Cohen's study, we also conducted an alternative regression analysis on the outcome dependent variable, substituting two components for the POLITICAL variable: (1) state and federal elected office, which we denominated ELECTED, and (2) state and federal high-level administrative appointed office, which we denominated APPOINTED.³⁷⁷ However, even in this alternative analysis (not reported in Table 4), neither ELECTED nor APPOINTED approached statistical significance in either direction while other variables remained stable. Thus, in our expanded study and with an independent set of variables, we were unable to confirm Cohen's findings on this category of prior employment.

c. Executive, Legislative, and Judicial Positions. One of the primary dividing lines in the Sentencing Guidelines constitutionality cases was whether the Sentencing Commission was properly located in the judicial branch or whether, as the Department of Justice requested, it should be relocated to the executive branch. Thus, it seemed fitting to explore whether a judge's prior employment experience in one or another branch might affect the judge's view about the proper location of this unique governmental entity. As reported above,³⁷⁸ we developed dependent variables testing approval of the Justice Department's executive branch theory versus the Sentencing Commission's judicial branch theory. For both, we substituted for the variable POLITICAL³⁷⁹ two component variables denominated EXECUTIVE (consisting of elected or appointed high-level administra-

³⁷⁶ See Cohen, *supra* note 21, at 194 (regression analysis), 196-97.

³⁷⁷ See *supra* note 192. From Cohen's article, it is not clear how he implemented his "Public Official (appointed)" and "Public Official (elected)" variables. In particular, we do not know whether he attempted to include county and municipal offices, for which information about the nature of selection to office is difficult to find. However, because his cell counts for these two variables approaches ours, even accounting for the larger number of judges overall included in our study (294 versus 196), we believe it likely that we adopted similar measures. Cohen coded 12 judges as holding appointed public office compared to 10 judges included in our APPOINTED variable, and he coded 11 judges as holding elected public office, compared to 23 judges in our ELECTED variable. See *id.* at 191.

³⁷⁸ See *supra* Table 7, Columns 2, 3.

³⁷⁹ For these analyses reported in Table 7, Columns 2 and 3, we also excluded the variable PROSECUTOR because of concerns that it was collinear and thus competed with the EXECUTIVE category.

tive positions in both the state and federal government)³⁸⁰ and LEGISLATIVE (consisting of membership in Congress or a state legislature).

On this dependent variable, the EXECUTIVE variable was very close to significance at the 95% probability level.³⁸¹ Executive experience increased the likelihood of a judge to accept the Department of Justice's position that the Sentencing Commission should be regarded as located in the executive branch. Moreover, although not technically statistically significant, such experience appeared to be a powerful explanatory factor.³⁸² On the other hand, only nine judges had prior executive branch experience (as defined for this study³⁸³), which counsels caution. This case involved a rather direct test of executive

³⁸⁰ We debated what implementation of the EXECUTIVE variable would most appropriately measure an individual's identification with and perhaps loyalty to this branch of our tripartite government. We agreed from the outset that the positions would have to be high-level ones that steeped a person in the policymaking activities of the executive branch, as opposed to lower-level governmental service. Accordingly, we limited it to selected state administrative offices listed by the Council of State Governments and to federal offices requiring Senate confirmation. We then developed three alternatives: "Strict Executive" (including only those who had served in high-level state administrative positions or federal executive branch positions requiring Senate confirmation), "Executive + Independent Agencies" (adding those who had served in positions requiring Senate confirmation in federal independent agencies), and "Expanded Executive" (adding federal prosecutors). We rejected the third alternative as unduly expansive and also because we doubted that service as a prosecutor in a United States Attorney's office engenders the same high-degree of association with the executive branch. Between the first and second alternatives, we chose the second (including both strictly executive branch and independent agency offices requiring Senate confirmation) as less narrowly defined than the stricter first alternative. In any event, the difference between the two alternatives was a single judge (who had served in an independent agency).

³⁸¹ In this study, we have adhered strictly to the traditional 95% probability level as the minimum threshold for reporting significance, other than noting near significance above the 90% level on alternative analyses for variables that independently met the 95% standard in a reported regression analysis. In this particular case, however, the significance figure is $p < 0.0508$, thus meaning it falls short only due to rounding and by less than a tenth of a percentage point. Moreover, in certain preliminary alternative regression analyses, EXECUTIVE surpassed the mark. For these reasons, we believe it worthy of mention and explanation.

³⁸² The odds multiplier for EXECUTIVE on this "Sentencing Commission in Executive Branch" dependent variable is among the highest found for any significant variable on any analysis in this study—31.84. However, the small cell count could account for this exceptionally high multiplier. For a discussion of the odds multiplier, see *supra* note 291. With respect to this dependent variable, 9% of judges addressing this issue located the Sentencing Commission in the executive branch. Thus, the odds of a proexecutive branch ruling were approximately .10 (.09 divided by .91). As the odds multiplier for EXECUTIVE is 31.84, the odds of a ruling locating the Commission in the executive branch were increased by the presence of this variable to approximately 3.18 (31.84 multiplied by .10). Thus, holding all other variables constant, the EXECUTIVE variable increased the probability of a proexecutive branch ruling on the branch location issue from 9% to 76%.

³⁸³ See *supra* note 380.

branch jurisdiction and a judge's prior policymaking involvement in the executive branch (state or federal) appears to predispose that judge toward protecting executive authority. However, greater support for the executive branch location did not translate into stronger aversion to the judicial branch location, as EXECUTIVE was not significant on the dependent variable measuring support for the judicial location. By contrast, neither LEGISLATIVE nor JUDGE (which is discussed further below³⁸⁴) was an explanatory factor for approving or disapproving one location against another.

3. State or Local Judge

In prior studies, judicial experience prior to ascending to the federal bench has infrequently been an explanatory factor and, when occasionally correlated with judicial behavior, has been a weak influence.³⁸⁵ Prior studies have related judicial experience to judicial liberalism.³⁸⁶ Moreover, "the insulation from popular sentiments that the judicial office often provides" should make a judge with prior judicial experience "more willing to support potentially unpopular claims."³⁸⁷ Extrapolating that general hypothesis to the present context, we would expect federal judges who have become even more accustomed to the independent judicial role through prior state or local judging to be more willing to set aside a popular reform like the Sentencing Reform Act if they believe it offends constitutional principles. Even more importantly, the Sentencing Guidelines were accurately perceived as a direct reduction in judicial discretion and thus judicial power. Judges with a stronger role identification, enhanced by prior judicial experience at the state and local level, would presumably be more offended by the restraints of the Guidelines.

Notably, our findings suggest precisely the opposite. As reported above,³⁸⁸ under both the standard and alternative set of variable analysis for the outcome dependent variable, JUDGE is significant at the 95% probability level with a *positive* coefficient. Thus, prior judicial experience at the state or local level was indeed significantly correlated, but in the unanticipated direction of greater approval of the Sentencing Guidelines. The consistency of the finding under two sets of independent variables suggests a degree of stability for this factor,

³⁸⁴ See *infra* Part V.C.3.

³⁸⁵ See *supra* notes 30-31 and accompanying text.

³⁸⁶ See Aliotta, *supra* note 39, at 278-80; see also Eisenberg & Johnson, *supra* note 32, at 1190 (finding that judges with prior judicial experience treated racial equal protection claims more favorably).

³⁸⁷ Aliotta, *supra* note 39, at 279 (speaking of Supreme Court justices with prior judicial experience).

³⁸⁸ See *supra* Table 4.

although it does not arise in any alternative dependent variable test included in our study. It proves to be a moderate explanatory factor.³⁸⁹

What might account for this result? Might state and local judges, particularly if subject to electoral approval, be more deferential to the product of the political branches, such as the Sentencing Guidelines? But surely even elected state and local judges are less immediately responsive to popular control than ordinary politicians, and yet as discussed above, prior political experience is not a significant factor in our study while prior judicial experience is. Are state and local judges more constrained in available choices and thus less accustomed to judicial discretion (and thus less aggrieved by its loss)? Or perhaps because state judges enjoy less independence and accord greater deference to prosecutors at the sentencing phase, are former state judges less likely to find fault with a sentencing system that shifts power away from the bench and toward the prosecution? A satisfactory answer is difficult to formulate. However, our study suggests that the effect of prior judicial experience cannot be dismissed in empirical study and bears further investigation in other contexts.

4. *Military Service*

Military experience has received little attention in empirical studies as a potential influence on judicial behavior.³⁹⁰ We postulated that a military background would condition a person to be accepting of detailed directions and the loss of individual discretion. Thus, a plausible hypothesis is that those judges who had served in the military would be more likely to accept the Guidelines approach to sentencing and be more willing to uphold it against constitutional challenge.

³⁸⁹ The odds multiplier for JUDGE on the outcome dependent variable is 1.85 with the standard set of variables and 1.81 with the alternative set. For a discussion of the odds multiplier, see *supra* note 291. On the general outcome dependent variable, 39% of judges upheld the constitutionality of the Guidelines, see *supra* Table 5. Thus, the odds of a ruling sustaining the constitutionality of the Guidelines were approximately .64 (.39 divided by .61). As the odds multiplier for JUDGE is 1.85 with the standard set and 1.81 with the alternative set, the odds of a ruling in favor of the Guidelines were increased by the presence of this variable to approximately 1.18 (1.85 multiplied by .64) and 1.16 (1.81 multiplied by .64), respectively. Thus, holding all other variables constant, the JUDGE variable increased the probability of a positive constitutionality ruling from 39% to approximately 54% for both the standard set and the alternative set of variables.

³⁹⁰ In a study of criminal sentencing, Beverly Blair Cook hypothesized that judges with military experience would impose more severe punishment, but found the opposite. See Cook, *supra* note 301, at 624. Given the particular context of sentences for military draft offenders, she concluded that "more lenient sentences [by a judge with military experience might be] compensation for his known association with the military" or that he might have "no motivation to prove his devotion to national security by giving severe sentences since he already had earned his credentials." *Id.* at 624-25. That prior study thus provides little guidance in formulating a hypothesis for the effect of military background in our case.

With respect to the basic dividing line of constitutional versus unconstitutional rulings, the variable MILITARY proved insignificant across all parallel analyses. However, it did emerge in one part of our study and, at least in retrospect, in a predictable manner. As reported above,³⁹¹ MILITARY was significantly and strongly correlated with a judge's resistance to the Department of Justice's plea to relocate the Sentencing Commission from the judicial branch to the executive branch.³⁹² Given that the statute does clearly designate the entity as "an independent commission in the judicial branch of the United States,"³⁹³ we might conclude that a former soldier recognizes a direct order when he hears it.

5. *Law Professor*

Law professors are distinctively unrepresentative of the general population in terms of ideology, identifying themselves as Democrats nearly twice as often as members of the general public.³⁹⁴ Given the uncertain ideological dimensions of the Sentencing Guidelines issue,³⁹⁵ as well as the nonrandom selection of professorial candidates for the federal bench,³⁹⁶ it was unlikely from the outset that this variable would prove to be an explanatory factor. That prediction was borne out. Even on the judicial choice between practical and theoreti-

³⁹¹ See *supra* Table 7, Column 2.

³⁹² The variable MILITARY is significant at the 95% probability level and negatively correlated with the Department of Justice's position that the Commission could be moved to the executive branch, see *supra* Table 7, Column 2. The odds multiplier for MILITARY is .25. For a discussion of the odds multiplier, see *supra* note 291. With respect to this dependent variable, 9% of judges addressing this issue located the Sentencing Commission in the executive branch. Thus, the odds of a proexecutive branch ruling were approximately .10 (.09 divided by .91). As the odds multiplier for MILITARY is .25, the odds of a ruling locating the Commission in the executive branch were decreased by the presence of this variable to approximately .03 (.25 multiplied by .10). Thus, holding all other variables constant, the MILITARY variable decreased the probability of a proexecutive branch ruling on the branch location issue from 9% to between 2% and 3%.

³⁹³ 28 U.S.C. § 991(a) (1994).

³⁹⁴ See Devins, *supra* note 321 (reporting that 80.4% of law professors are Democrats, compared with 46.2% of full-time working population (citing James Lindgren, *Measuring Diversity, Speech to the National Association of Scholars* (Jan. 5, 1997))); see also *supra* notes 321-22 and accompanying text (discussing disproportionate liberalism of law faculties).

³⁹⁵ See *supra* Part V.B.

³⁹⁶ See Timothy B. Tomasi & Jess A. Velona, Note, *All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 Colum. L. Rev. 766, 779 n.66 (1987) (finding in study of courts of appeals judges that "four of the five 'academic' Reagan judges studied . . . were more conservative than other Republican appointees"). During the 1980's, a common joke in conservative circles was that President Reagan was decimating the ranks of conservative law professors at leading law schools by appointing them to the federal bench.

cal reasoning,³⁹⁷ where one would imagine that any law professor might wax philosophical irrespective of ideology, background as a full-time law professor was not significant.

D. Judicial Role or Institution Variables

We developed three variables to gauge the influence upon decisionmaking of the judge's perceived qualifications upon initial appointment to the district court, the judge's workload measured in terms of total caseload and alternative fraction of caseload devoted to criminal matters, and the judge's seniority on the federal bench. Each of these three variables is designed to measure an aspect of the federal judicial role or institutional environment.

1. American Bar Association Rating

The American Bar Association's (ABA) Standing Committee on the Federal Judiciary conducts an investigation of possible nominees for the federal courts and reports a qualification rating for each candidate nominated by the president.³⁹⁸ The ABA rating variable proved influential in this study. Judges with different ABA ratings did not vote differently on the general outcome question of whether the Sentencing Guidelines were or were not constitutional. But a statistically significant and moderately strong variance did arise on the two dependent variables that indicate an unorthodox path toward invalidation of the Guidelines. As reported above,³⁹⁹ the variable ABA-AQ negatively correlated (that is, associated with unconstitutionality results) at the 95% probability level on both the Non-Delegation Doctrine and the Due Process Claims dependent variables.⁴⁰⁰

³⁹⁷ See *supra* Table 11.

³⁹⁸ See *supra* notes 197-200 and accompanying text.

³⁹⁹ See *supra* Tables 9, 10.

⁴⁰⁰ The odds multiplier for ABA-AQ on the "Non-Delegation Doctrine" dependent variable is .34 and on the "Due Process Claims" dependent variable is .24. For a discussion of the odds multiplier, see *supra* note 291. With respect to the Non-Delegation Doctrine dependent variable, 69% of judges upheld the constitutionality of the Guidelines, see *supra* Table 5; thus, the odds of a ruling sustaining the constitutionality of the Guidelines were approximately 2.23 (.69 divided by .31). As the odds multiplier for ABA-AQ on this dependent variable is .34, the odds of a ruling favoring the Guidelines were decreased by the presence of this variable to approximately .76 (.34 multiplied by 2.23). Thus, holding all other variables constant, the ABA-AQ variable decreased the probability of a positive constitutionality ruling on the Non-Delegation Doctrine challenge from 69% to 43%. With respect to the Due Process Claims dependent variable, 42% of judges upheld the constitutionality of the Guidelines, see *supra* Table 5; thus, the odds of a ruling sustaining the constitutionality of the Guidelines were approximately .72 (.42 divided by .58). As the odds multiplier for ABA-AQ on this dependent variable is .24, the odds of a ruling upholding the Guidelines was decreased by the presence of this variable to approximately .17 (.24 multiplied by .72). Thus, holding all other variables constant, the ABA-AQ variable de-

Whereas most judges who found the Guidelines unconstitutional did so on the conventional grounds of separation of powers, a minority of judges adopted the nondelegation doctrine or the Due Process Clause as their rationale. Of the 179 judges who struck the Guidelines as unconstitutional, only 42 invoked the Due Process Clause to do so.⁴⁰¹ While judges opposed the Guidelines overall by 61% to 39%, judges *upheld* the Guidelines against the particular nondelegation doctrine challenge by 68% to 32%. Yet among the smaller band of judges who found a due process right to individualized sentencing or an improper delegation of legislative power to the Sentencing Commission, judges who had received ABA ratings higher than Qualified were disproportionately represented.

In sum, judges with higher ABA ratings (ABA-AQ) were significantly more likely to strike out from the mainstream and adopt marginal theories in their path to the outcome. By contrast, although not reported in Tables 9 and 10,⁴⁰² judges receiving mere "Qualified" ratings were significantly more likely to reject the alternative nondelegation doctrine and due process claims. In other words, just as judges with higher ABA ratings tended to be iconoclastic, judges with basic qualified ratings tended not to stray from the crowd.

Caution must be used in relying upon ratings by the ABA Standing Committee as accurate or objective evaluations of the professional qualifications of a judicial nominee. The Standing Committee has been criticized as biased in its process,⁴⁰³ as well as for

creased the probability of a positive constitutionality ruling on the Due Process Claim challenge from 42% to 15%.

⁴⁰¹ See *supra* notes 293-97 and accompanying text (explaining how Due Process Clause objection was outside mainstream in Guidelines litigation).

⁴⁰² Because the dummy variable for judges receiving a Qualified rating (ABA-Q) was used as the reference, it is not reported with ABA-AQ and ABA-BQ in Tables 9 and 10. However, when we conducted alternative regression analyses, in which ABA-AQ was used as the reference, ABA-Q emerged as significant at the 95% probability level with a positive coefficient (i.e., association with a constitutional result) on both the Non-Delegation Doctrine and Due Process Claims dependent variables.

⁴⁰³ Historically, the committee has given lower ratings to female and minority nominees. See Elliot E. Slotnick, *The ABA Standing Committee on Federal Judiciary: A Contemporary Assessment—Part 2*, 66 *Judicature* 385, 387 (1983); see also Henry J. Reske, *ABA Judicial Ratings Draw Fire*, *A.B.A. J.*, Nov. 1994, at 38-39 (reporting charge that "the ABA's system for evaluating judges is erratic, racist and weighted in favor of lawyers who have worked for silk-stockings firms"). Incidents of apparent religious discrimination by the Committee have been reported. See Victor Williams, *The ABA Judgemaker Committee Is Exposed, Albeit Shaded from FACA Sunshine*, 12 *Geo. Mason L. Rev.* 249, 260-62 (1990). Others view the Committee as elitist as well as biased in favor of those with prior judicial experience and trial lawyers. See Glick, *supra* note 26, at 141 ("Critics complain that the ABA procedures are highly elitist, since the committee mainly consults prominent lawyers and presidents of local bar associations in producing its judicial ratings."); Posner,

allowing the practice of split rating votes to be turned to political purposes.⁴⁰⁴

For these reasons, we do not attribute the variance in voting on the nondelegation doctrine and due process claims to a true and objective difference in quality among the judges. Thus, we do not conclude that "better" judges were more likely to adopt a nondelegation doctrine or due process objection to the Guidelines simply because judges who had received a higher ABA rating were so closely correlated in our study. Yet the significance of the findings for those receiving an "Exceptionally Well Qualified" and "Well Qualified"—and the opposite for judges receiving a mere "Qualified" rating—remains.

Alternatively, the ABA ratings may have the effect of playing to the ego of some judges who fare well in the process. While the rating is a most uncertain measure of objective qualifications, it may have an effect upon the subjective self-image of the judges receiving the rating. Indeed, if the ABA process does favor candidates who attended elite law schools, maintained traditional large firm practices, and had higher earnings prior to appointment,⁴⁰⁵ the higher ratings would be awarded to those who already have achieved great success in life. The high ABA rating would be the icing on the cake. The recipient may perceive it as further evidence of his or her own exceptional qualifications.

As a consequence, a judge who receives a higher ABA rating—with the implicit endorsement of greater ability—may tend to be bolder in action, more willing to blaze a new trail through the law, more *activist* in the judicial role. In other words, the ABA rating may be the insignia for, or even an intensification of, the confident overachiever who is compelled to distinguish himself or herself. If so, then

Federal Courts, *supra* note 155, at 19 & n.27 (criticizing preference of Committee for former judges and trial lawyers).

⁴⁰⁴ The most controversial example of this purported politicization of the Committee was the minority rating of "Not Qualified" given to Supreme Court nominee Robert H. Bork in 1987—allegedly based upon disagreement with his views on constitutional principles rather than his professional qualifications—by four members of the Standing Committee who were identified in the press as political opponents of the Reagan Administration. See Williams, *supra* note 403, at 264-66 (discussing ABA Committee's rating of Judge Bork, with citations to Senate reports and reports in various newspapers and legal periodicals); see also Bork, *supra* note 255, at 292-93 (describing ABA Committee's split vote as "extremely damaging to [his] nomination since the judgment was nominally about professionalism" and attributing this action to political opponents on Committee). Because of alleged politicization of the ABA, the Republican chair of the Senate Judiciary Committee recently terminated the Standing Committee's official role in confirmation proceedings, although the Clinton Administration intends to continue sending names of potential nominees to the Committee for evaluation. See Harvey Berkman, *Hatch to ABA: You're Out. ABA: So What*, *Nat'l L.J.*, Mar. 3, 1997, at A6.

⁴⁰⁵ See Slotnick, *supra* note 403, at 393.

those who wish to introduce greater restraint and moderation in judicial behavior may be well advised to be skeptical of the individual who is able to secure a high rating from the ABA.⁴⁰⁶ The ABA rating may, in at least some cases at the margins, induce or reflect a self-confidence and independence that produces measurable consequences for behavior in the judicial role.

We may be guilty of amateur psychoanalysis in this attempt to impose meaning upon a statistical finding⁴⁰⁷ or be mistaken in understanding an ABA rating as a trophy for the recipients.⁴⁰⁸ The ABA rating has received little attention in empirical studies of judicial behavior, as either a prediction of quality or a proxy for attitudes or predispositions in decisions.⁴⁰⁹ At the least, our findings should provoke further exploration in other contexts.

2. *Caseload/Workload*

Under an economic model, judges, like all human beings, are "leisure-seeking" actors with "an aversion to any sort of 'hassle,' as well as to sheer hard work."⁴¹⁰ "As the workload in a judge's district increases, that judge enjoys less leisure time, has a heavier backlog of

⁴⁰⁶ In addition, the ABA Committee's recent elimination of the "Exceptionally Well Qualified" rating may be a healthy development by preventing rated judges from thinking too highly of themselves as jurisprudential leaders. See American Bar Association, The ABA Standing Committee on Federal Judiciary: What It Is and How It Works 7 (1991) (describing three current ratings for judicial nominees). But see William G. Ross, Participation by the Public in the Federal Judicial Selection Process, 43 Vand. L. Rev. 1, 67 (1990) ("[T]here is no merit to the argument that the ABA should simplify its ratings system and deem each candidate to be merely 'Qualified' or 'Unqualified.' The existing gradations help to distinguish exceptional candidates from marginal ones.").

⁴⁰⁷ However, we at least are willing to present a hypothesis for further investigation. After all, "statistics is a methodology and not a substitute for creative thinking." Frederick D. Herzon & Michael Hooper, Introduction to Statistics for the Social Sciences 7 (1976).

⁴⁰⁸ See Laura E. Little, Loyalty, Gratitude, and the Federal Judiciary, 44 Am. U. L. Rev. 699, 737 (1995) (writing, in context of whether federal judges feel obligation of gratitude toward benefactors responsible for placing judge on bench, that "a poor rating by the ABA can doom a candidate, but a favorable rating provides no guarantee of confirmation" and thus "a nominee who is eventually confirmed is, in most instances, likely to view a favorable ABA rating as one of many hurdles in the process, rather than a benefit requiring repayment in some form"). Whether this view is accurate or reflects the sentiments of judges receiving the higher ABA ratings, rather than a mere favorable Qualified rating, requires further empirical study.

⁴⁰⁹ In a very recent study, Professors William Landes, Lawrence Lessig, and Michael Solimine measured the influence of individual federal court of appeals judges by citations to their published opinions and found that judges who had received unqualified ratings were significantly less influential with their peers. See William M. Landes, Lawrence Lessig & Michael E. Solimine, Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges, 27 J. Legal Stud. 271, 325 (1998).

⁴¹⁰ Posner, *What Do Judges Maximize*, *supra* note 52, at 20.

cases, and has less 'job satisfaction.'"⁴¹¹ For judges, the wellspring of work is of course the neverending stream of new cases to be resolved. However, while it never runs dry, the force of the current will ebb and flow and some cases may be deeper than others. Thus, under this model, the question is whether the Sentencing Guidelines entail more work and hassle or ease the judicial burden. The conventional wisdom was that judges feared the more severe Guidelines would discourage criminal defendants from accepting plea bargains and thus increase the number of criminal cases going to trial,⁴¹² although these fears apparently proved groundless.⁴¹³ In his study, Mark Cohen postulated that district judges would tend to oppose the Guidelines more fervently if they carried heavier dockets.⁴¹⁴ His findings supported that hypothesized relationship, as he found a significant negative correlation between both civil and criminal workload variables and support for the Guidelines.⁴¹⁵

By contrast, our study produced the opposite result. Our standard CASELOAD variable (combined civil and criminal filings per authorized judge in each district) was not significant on any pertinent dependent variable in our study.⁴¹⁶ But the alternative CRIM-CASELOAD variable, which measures the proportion of a judge's total caseload that consists of criminal filings, was significant or nearly so on more than one test, confirming its stability as an influence. First, CRIM-CASELOAD is significant at the 95% probability level on the general constitutional/unconstitutional outcome variable.⁴¹⁷ But it has a *positive* coefficient and therefore correlates with a tendency to up-

⁴¹¹ Cohen, *supra* note 209, at 16.

⁴¹² See Cohen, *supra* note 21, at 187.

⁴¹³ See *id.*; see also Karle & Sager, *supra* note 165, at 444 (concluding, in statistical study of sentencing under Guidelines, that they have not measurably affected plea bargain rates).

⁴¹⁴ See Cohen, *supra* note 21, at 187, 193.

⁴¹⁵ See *id.* at 193-94.

⁴¹⁶ The CASELOAD variable was significant at the 99% probability level on the dependent variable for "Practical v. Theoretical" reasoning, as reported in Table 11, and positively correlated with theoretical reasoning. In our view, this result is likely meaningless, as there is little reason why a judge's workload would influence the style of reasoning. At most, one could hypothesize that practical reasoning, which demands attention to detail and an evaluation of the factual setting, is more time-consuming and thus that a busy judge would prefer a theoretical dismissal of a claim. On the other hand, the constitutional question in the Sentencing Guidelines cases was largely abstract and divorced from the facts, such that practical reasoning might have been the path of least resistance here. Moreover, one could just as easily assume that a judge with a heavier workload would lack the time or patience to engage in high-level conceptual reasoning and feel compelled by circumstances to render a decision that is firmly and practically grounded. In any event, whether or not a valid explanation can be given for the significance of CASELOAD on this dependent variable, it would be distinct from and shed no light on the influence of workload on the judge's resolution of the constitutional challenge to the Guidelines.

⁴¹⁷ See *supra* Table 4.

hold the Guidelines, not to reject them. Second, on the "Separation of Powers—Judge Members" dependent variable, in the alternative regression analysis, CRIM-CASELOAD fell just below significance at the 95% probability level,⁴¹⁸ again with a positive coefficient.⁴¹⁹

Why would the association be positive and diametrically opposed to Cohen's findings?⁴²⁰ One reason for the contrary finding might be that our study included the entire universe of 294 decisions, while Cohen's study included only a partial set of 196 observations, and that we created a somewhat different set of independent variables for analysis. But the reason for a different statistical result does not provide an explanation for the finding.

For the coauthor with greatest prior exposure to these issues (having litigated Guidelines constitutionality cases on behalf of the government in 1988), this result was surprising. Interestingly, the other two did not find the positive result so remarkable, as they independently had postulated that the Sentencing Guidelines could be perceived by judges as a laborrelieving measure that would streamline and coordinate the sentencing process. In addition, we might speculate that judges with a larger criminal docket may have appreciated more poignantly the problem of sentencing disparity that the Sentencing Guidelines were designed to reduce.

In terms of the economic model, both the prior Cohen study and our present one confirm that the judges' workload, measured in terms of size and proportion of criminal docket, indeed influences judicial behavior. The difference between the two is *how*. Once again, this study is best understood as the point of departure for further exploration of the effect of caseload upon resolution of cases or issues in the courts.

⁴¹⁸ See *supra* Table 8.

⁴¹⁹ The variable CRIM-CASELOAD was above the 94% probability level on this test. While we would not report this second result without the independent significance finding above the 95% level on the outcome test, this separation of powers test closely tracks and thus confirms findings at the outcome level. The separation of powers challenge to required judicial membership on the Commission was one of the primary objections and was addressed by 170 of the 188 judges who authored or participated in written opinions. See *supra* Tables 5, 6.

⁴²⁰ To begin with, the possibility of an error exists. As an additional test, we conducted an alternative regression analysis on the outcome variable with still another substitute measure of workload in the form of the raw criminal filings per district judge (that is, without comparison to total filings in the form of a ratio). This substitute criminal caseload variable was likewise both significant and positive. Going even one step further, we conducted yet another regression analysis with the criminal filings variable in which we excluded the CRIME-RATE variable to avoid any possible collinearity between the level of crime in the locality and the judge's criminal caseload—CRIM-CASELOAD remained significant and still positive.

3. *Seniority on Federal Bench*

In prior research, the hypothesis has been that years of seniority on the bench "test hardening not of the biological arteries [as would age] but rather of the bureaucratic judicial arteries."⁴²¹ Indeed, at the time of the Sentencing Guidelines constitutionality decisions, anecdotal evidence suggested that more senior judges especially resented the limitations placed on judicial discretion by the new Guidelines system, while those more recently appointed welcomed or at least tolerated the assistance in the exercise of discretion that the Guidelines presented.⁴²² If this hypothesis were confirmed by the study, it would suggest that life tenure permits federal judges to become entrenched in their ways and resistant to new ideas or, alternatively, assists judges in recognizing and protecting the institutional integrity of the judicial branch.

Our study does not confirm the hypothesis. The variable SENIORITY does not correlate with approval or disapproval of the Guidelines on either the basic outcome dependent variable or any of the constitutional theory dependent variables. This could mean either that, contrary to the impressionistic view at the time, the Guidelines were not less popular with more senior compared to more junior judges, or instead that judges with longer tenure and stronger antipathy to the Guidelines were able to separate their personal policy preferences from their constitutional judgments to a comforting degree.

Instead, seniority on the bench proved significant in two unsurprising and consistent ways, both involving basic reasoning style rather than general outcome. Long tenure on the federal bench positively correlated with practical reasoning⁴²³ and negatively correlated with originalism.⁴²⁴ Thus, one could hypothesize that greater seniority

⁴²¹ Goldman, *supra* note 28, at 499. Goldman found little relationship between years of judicial experience and judicial voting behavior. See *id.* at 499-500.

⁴²² See Bowman, *Quality of Mercy*, *supra* note 72, at 712 n.121 (stating that, in author's experience as prosecutor, "judges appointed since 1987 are much less resistant to the Guidelines than their predecessors," and that "[r]ecently appointed judges may not unanimously embrace the Guidelines, but many . . . seem to welcome the guidance afforded by a set of sentencing standards").

⁴²³ See *supra* Table 11.

⁴²⁴ As reported in Table 12, SENIORITY is significant at the 95% probability level in Column 2, which was an alternative regression analysis in which the dummy variable REAGAN was substituted for PARTY. With the standard set of variables, reported in Column 1, SENIORITY just barely fell below the 95% probability level (SENIORITY was significant at $p < .06$).

For continuous variables, the odds multiplier represents the effect of a unit increase in the variable. See Clermont & Eisenberg, *supra* note 291, at 1146. Accordingly, for continuous variables included in this study, such as those representing caseload, seniority of judges, promotion potential, and precedent, determining and explaining the size of the

tends to make a judge more worldly-wise (practical) and less taken with jurisprudential trends (nonoriginalist). Moreover, given that the mean length of seniority for the judges in this study was nine and one-half years,⁴²⁵ judges with longer tenure would have been appointed before the originalism debate moved to the forefront of the constitutional interpretation discussion during the 1980's. Accordingly, the more theoretical, and less pragmatic, originalist approach not only would have been less visible during the formative early years on the bench for judges with longer tenure, it would have little if any role in judicial recruitment in the pre-Reagan era.

E. Promotion Potential Factor

The "structure of the 'independent' judiciary," by conferring life tenure upon judges, "is designed to remove judges from the day-to-day pressures and temptations of ordinary political office."⁴²⁶ Thus, as Richard Epstein explains, judges do not fit easily within public choice theory, which "presupposes that what drives politicians is the desire for reelection to office, election to higher office, or influence and power within office."⁴²⁷ But while federal judges, by conscious design, may be "insulated from these electoral sanctions,"⁴²⁸ they are not immune from the temptations of higher office within the judiciary it-

influence is more difficult. Indeed, for the CRIM-CASELOAD ratio, the PROMO-POT factor score, and the PREC-CIR special ratio, identifying the unit and providing an easily accessible explanation is either impossible or more trouble than it is worth. However, for SENIORITY the unit is the familiar one of months and thus the odds multiplier can be translated into an understandable probability. The odds multiplier for SENIORITY on the "Practical versus Theoretical" dependent variable is 1.01 and on the "Originalist versus Non-Originalist" dependent variable is .95. With respect to the Practical dependent variable, 34% of judges adopted practical reasoning, see *supra* Table 5; thus the odds of adoption of practical reasoning were approximately .52 (.34 divided by .66). As the odds multiplier for SENIORITY on this dependent variable is 1.01, the odds of practical reasoning were increased by the presence of this variable to approximately .53 (1.01 multiplied by .52). Thus, holding all other variables constant, the SENIORITY variable increased the probability of use of practical reasoning from 34% to 35%. With respect to the Originalist dependent variable, 34% of judges adopted originalist interpretation, see *supra* Table 5; thus the odds of adoption of originalist interpretation were also approximately .52 (.34 divided by .66). As the odds multiplier for SENIORITY here was .95, the odds of use of originalist interpretation were decreased to approximately .49 (.95 multiplied by .52). Thus, the SENIORITY variable decreased the probability of use of originalist interpretation from 34% to 33%. Although these probability changes may seem very small, the unit again is months of seniority, and the sizable nature of these changes can be appreciated by considering how these changes would accumulate as a judge gains in tenure month-by-month.

⁴²⁵ See *supra* Table 2.

⁴²⁶ Epstein, *supra* note 51, at 831-32.

⁴²⁷ *Id.* at 836.

⁴²⁸ *Id.*

self—an ambition that depends upon the approval of the political branches for success. While aspirations for the Supreme Court may be foolish fancy for all but a select few,⁴²⁹ forty percent of circuit judges are promoted from the ranks of the district judges.⁴³⁰

The lure of a circuit court appointment as an influence upon district judge decisionmaking was a centerpiece of Cohen's earlier work with the Sentencing Guidelines decisions. Cohen conceptualized "promotion potential" in terms of competition among district court judges for available positions (measured by the ratio of district judges in a state to circuit judgeships in that state), the presence or absence of vacancies for circuit judgeships, and the age of the oldest active circuit judge in the state (as a rough estimate of when the next vacancy will occur).⁴³¹ He hypothesized that judges with a greater potential for promotion would be motivated to uphold the Guidelines, because an "unconstitutional ruling would clearly place the judge at odds with the Justice Department, Congress, and the White House—all of whom publicly supported the Commission."⁴³² The results of Cohen's study strongly confirmed this thesis, as he found his promotion potential factor variable significant at the 99% probability level and positively correlated with a constitutional ruling.⁴³³

⁴²⁹ Even for the select few under consideration for a Supreme Court appointment, the ability to enhance promotion prospects through decisionmaking is most uncertain. Fifth Circuit Judge Patrick Higginbotham wrote an opinion highlighting criticism by commentators of *Roe v. Wade*, 410 U.S. 113 (1973), but ultimately stating that he was constrained by Supreme Court opinions to strike a restrictive Louisiana abortion statute. See *Margaret S. v. Edwards*, 794 F.2d 994, 995-99 (5th Cir. 1986). Another member of the panel who separately concurred was critical of Higginbotham's use of a circuit opinion to suggest disapproval of a Supreme Court precedent. See *id.* at 999-1000 (Williams, J., specially concurring). Ironically, when Higginbotham's name was floated for a possible Supreme Court nomination, some anti-abortion groups opposed his nomination on the grounds that he had authored an opinion striking the statute, ignoring his indirect statement of opposition to *Roe*. See Neal Devins, *Through the Looking Glass: What Abortion Teaches Us About American Politics*, 94 Colum. L. Rev. 293, 323 (1994) ("[P]ro-life interests scuttled the planned nomination of federal appeals court Judge Patrick Higginbotham to the Supreme Court because he recognized—albeit reluctantly—*Roe* to be the law of the land in one of his opinions.") (book review). If Higginbotham was attempting to signal his hostility to *Roe* as a means of gaining promotion to the Supreme Court, the effort failed. See also Posner, *What Do Judges Maximize*, *supra* note 52, at 5 (questioning impact of any particular decision on prospects for promotion from court of appeals to Supreme Court, saying "[s]ome decisions have no impact at all on those prospects and in the case of almost all the remaining decisions the impact is unpredictable—the decision may offend as many influential people as it pleases").

⁴³⁰ See Deborah J. Barrow, Gary Zuk & Gerard S. Gryska, *The Federal Judiciary and Institutional Change* 80 (1996); Posner, *The Federal Courts*, *supra* note 155, at 350.

⁴³¹ See Cohen, *supra* note 21, at 192.

⁴³² *Id.* at 188.

⁴³³ See *id.* at 193-94. Subsequently, in a longitudinal study of district court rulings in the context of criminal antitrust sanctions, Cohen also found that promotion potential ex-

At the outset of our study, when formulating hypotheses, we believed the promotion potential thesis to be counterintuitive in this particular context, especially for Republican-appointed district judges anticipating elevation to the circuit bench by a Republican president. As was generally known at the time, and is discussed at length earlier in this article,⁴³⁴ the Reagan Administration Department of Justice was divided over the constitutionality of the Sentencing Commission under separation of powers analysis. Indeed, the Department of Justice and the Sentencing Commission filed separate briefs and argued separately before the district courts, the courts of appeals, and ultimately the Supreme Court. Before the district and appellate courts, the Department of Justice essentially acknowledged that the Sentencing Commission could not constitutionally be located within the judicial branch, but urged that this invalid part of the Sentencing Reform Act could be severed from the rest of the statute and the Sentencing Commission could be recognized as an executive branch body.

Given this sharp division within the Administration itself on the merits of the case, we thought it unlikely that Republican-appointed district judges would have feared that invalidation of the Guidelines might alienate the influential individuals in the Department of Justice who evaluate candidates for nomination to the appeals court. In this regard, it is notable that at least two prominent appellate judges who rejected the Sentencing Guidelines were regarded as leading exponents of the Reagan judicial philosophy.⁴³⁵

Moreover, as an informal test, we identified eleven district judges issuing Guidelines rulings in 1988 who actually did achieve subsequent promotion to the court of appeals (as of August 1997).⁴³⁶ These judges were almost perfectly balanced between those who voted to uphold the constitutionality of the Guidelines (six) and those who voted to strike the Guidelines as unconstitutional (five).⁴³⁷ Thus, ac-

plained a significant portion of the variance in corporate criminal antitrust penalties. See Cohen, *supra* note 209, at 27. Thus, Cohen has successfully replicated his findings in another context.

⁴³⁴ See *supra* notes 86-92, 317-23 and accompanying text.

⁴³⁵ See *supra* note 334 and accompanying text (discussing Sentencing Guidelines constitutionality opinions of Justice Scalia and Judge Kozinski).

⁴³⁶ There were other district court judges serving in 1988 who subsequently were promoted to the courts of appeals, but who had not issued any ruling on the constitutionality of the Sentencing Guidelines and thus are outside the scope of this study.

⁴³⁷ At the time Cohen conducted his study, five district judges who had ruled on the Guidelines had been elevated to the courts of appeals, and four of these five had upheld the constitutionality of the Commission, thus supporting his hypothesis. See Cohen, *supra* note 21, at 189. The fact that the judges who were elevated relatively soon after the Sentencing Guidelines Crisis were disproportionately favorable to the Guidelines may indicate

tual experience suggests that a negative ruling on the Guidelines did not adversely affect promotion prospects.

At the general level, our study strongly confirms Cohen's findings on the association between promotion potential and constitutional rulings. Adopting Cohen's formula for this variable, with some revisions,⁴³⁸ we found the PROMO-POT factor variable to be positively associated with the general outcome dependent variable.⁴³⁹ Although the confidence level in our study at the outcome level is not as high as in Cohen's study—ours is at the 95% probability level while Cohen's was at the 99% probability level—the significance of the variable is further confirmed in our study by its consistency across dependent variables. As reported above,⁴⁴⁰ promotion potential is also positively correlated with rejection of both the separation of powers challenge to required judicial membership on the Commission and the nondelegation doctrine claim.⁴⁴¹ Moreover, on two out of the three regression analyses reported for these two dependent variables, PROMO-POT is significant at or near the 99% probability level.

The story does not end there, however. If district judges truly were angling for promotions to the court of appeals, they presumably would be most attentive to the position advocated by the Department of Justice, which of course plays an influential role in judicial recruitment. Thus, we would expect district judges with a higher expectation for promotion potential—particularly those appointed by Republican presidents and thus most eligible for advancement by President Reagan or his then-hopeful-successor Vice President Bush—to have a greater tendency to accept the Department of Justice's argument that the Sentencing Commission should be removed from the judicial branch and upheld as an executive branch agency, if at all.⁴⁴² This thesis is *not* confirmed by our study. With respect to the dependent variable measuring rulings on the Department of Justice's executive branch scenario, the PROMO-POT variable does not approach significance.⁴⁴³ Even when we control for political party, in an alternative

that these decisions played a more significant role in promotion decisions at that time, but was of declining interest to those involved in judicial discretion over time.

⁴³⁸ See *supra* Part III.A.6.

⁴³⁹ See *supra* Table 4.

⁴⁴⁰ See *supra* Tables 8, 9.

⁴⁴¹ PROMO-POT is also significant at the 95% probability level for an alternative analysis on the general "Separation of Powers-Branch Location" dependent variable, when the variable CRIM-CASELOAD is added to the set of independent variables. This is further evidence of the consistency of influence of the PROMO-POT variable.

⁴⁴² See *supra* notes 87-89 and accompanying text (describing Department of Justice position).

⁴⁴³ See *supra* Table 7, Column 2.

analysis limited to district judges appointed by Republican Presidents, this promotion potential variable does not emerge as significant.

How to explain the inconsistency between the influence of promotion potential at the general outcome level and its absence upon deeper exploration at the constitutional theory level? One explanation would be that judges appreciated the career implications of the Sentencing Guidelines ruling only in the most general sense, that is, in terms of general support for the Guidelines on any basis. However, this rationale is difficult to credit. The importance to the Reagan Administration of the unitary executive concept, and its implications for the Sentencing Commission, were well known. And the district judges were made pointedly aware of that position—and its significance—by the conflicting arguments presented in the Department of Justice's brief and the Sentencing Commission's brief.⁴⁴⁴ Thus, it is unlikely that the district judges were ignorant of or insufficiently sophisticated to appreciate the promotion potential consequences of an acceptance or rejection of the Department of Justice position on the particular "branch location" issue.

The clue to solving this mystery may lie in partisan factors, that is, the possibility of a variance between Republican-appointed and Democrat-appointed judges in response to the promotion potential variable.⁴⁴⁵ As noted earlier, we had theoretical doubts at the outset that an adverse ruling on the Guidelines would have been detrimental to a district judge's prospects for promotion from a Republican administration. Recognizing that judges appointed to the district court bench by Republican presidents were most likely to be eligible for promotion to the circuit bench by President Reagan or then-candidate George Bush, a full exploration of the influence of promotion potential should include an analysis that controls for political party.

To investigate our theory that partisan factors may have affected the promotion potential influence in this instance, we performed an alternative regression analysis on the general outcome dependent variable with the addition of a new independent variable designed to measure this factor. We constructed an interaction term (PARTY * PROMO-POT).⁴⁴⁶ When adding this variable to the regression analy-

⁴⁴⁴ See *supra* notes 85-92 and accompanying text (describing model briefs presented by Department of Justice and Sentencing Commission).

⁴⁴⁵ Cohen did not control for political party in his promotion potential analysis. See Cohen, *supra* note 21, at 193.

⁴⁴⁶ Because our theory suggests that the primary positive interaction is between judges appointed by Democratic presidents and promotion potential, we reversed the PARTY coding for this interaction term. Whereas we had coded Republican-appointed judges as "1" for the PARTY variable, we coded Democrat-appointed judges as "1" for the INTER-

sis, PROMO-POT falls out of significance and the newly created INTERACT variable is significant only to the 90% probability level (although it is positive and thus in the hypothesized direction). Thus, while the INTERACT variable does not reach the conventional 95% probability level for a declaration of significance, it nonetheless appears to be an important factor given its substantial dampening effect on the significance of PROMO-POT, while the results for the other independent variables remained remarkably stable. In sum, *something* is going on here, and the standard regression run showing PROMO-POT to be highly significant cannot be accepted at face value.

To further explore this factor, although recognizing that this is not theoretically the most appropriate technique,⁴⁴⁷ we also separated Republican- and Democrat-appointed judges into separate categories for independent regression analysis. In other words, we alternatively controlled for partisanship by separate regressions on judges appointed by presidents of each political party. When only Republican-appointed judges are analyzed, the PROMO-POT variable falls well outside of significance. By contrast, when Democrat-appointed judges are separately analyzed, the significance of promotion potential increases to nearly the 99% probability level.

Accordingly, these two alternative regression runs, considered separately or cumulatively, suggest that Republican-appointed district judges indeed may have responded differently in light of the mixed signals on the issue sent by the Republican administration. And if promotion potential was not an influence in terms of general outcome for Republican-appointed judges, it is unsurprising that these judges were likewise unmoved by particular constitutional theories. As discussed earlier,⁴⁴⁸ Reagan-appointed judges were significantly less likely to support relocation of the Sentencing Commission from one branch to another, promotion potential aside. Thus, even if the poten-

ACT variable so that both PARTY and PROMO-POT would be pointing in a positive direction for purposes of this construction.

⁴⁴⁷ Unless we believe that a particular variable (in this case PARTY) systematically distinguishes judges across background variables, then all judges should be included in the same equation. Because we have no basis for concluding that Democrat-appointed judges are systematically distinguishable from Republican-appointed judges on other independent variables, a division of these judges into separate regression equations is not theoretically appropriate. Nonetheless, because the single equation approach confirms that the statistical significance of PROMO-POT is destroyed by the introduction of the INTERACT term, our use of the separate equations approach for supplemental investigation may have some probative value. Indeed, the interesting and strikingly contrasting results for Republican- and Democrat-appointed judges—in a manner directly consistent with our hypothesis—suggest this approach had commonsense worth, however theoretically contraindicated.

⁴⁴⁸ See *supra* Part V.B (discussing party variables).

tial for promotion to a vacant circuit judgeship was high, these judges may have thought it better to demonstrate consistent antipathy to creative judicial remedies (including rewriting statutes in court) than to bend to the government's contrary importunings in one case.

By contrast, for district court judges appointed by a Democratic president, the potential for promotion to any court of appeals vacancy was likely dependent upon the election of candidate Michael Dukakis, whose prospects appeared excellent at the time that most of the Sentencing Guidelines decisions were rendered.⁴⁴⁹ Given that Dukakis had endorsed the Sentencing Commission,⁴⁵⁰ the signal from the putative Dukakis Administration was clear. For that reason, a significant correlation with a positive constitutionality ruling at the outcome level is not surprising. Furthermore, since Democrat-appointed judges were unlikely to get the nod for elevation from a Republican president in any event, there was certainly no reason to give closer attention to the Reagan Administration Department of Justice's position on branch location of the Commission.

In conclusion, while confirming Cohen's finding at the general level, our deeper exploration of this variable may have uncovered a partisan variation on this influence,⁴⁵¹ one that is not surprising in light of the full circumstances. Given the consistency of the influence of this variable in our study, across different dependent variables, we and Cohen have both confirmed that promotion potential is a factor in understanding lower federal court behavior. At the same time, we have discovered that this variable does not operate in isolation but evolves with the circumstances of the litigation and the theoretical underpinnings of the case.

F. Precedential Influences

When the Sentencing Guidelines Crisis erupted at the beginning of 1988, there was no precedent from the Supreme Court or any court of appeals directly on point. In the late 1970's and early 1980's, however, the Supreme Court had rendered a series of decisions that appeared to embrace the formalist view of separation of powers,⁴⁵²

⁴⁴⁹ See Cohen, *supra* note 21, at 193.

⁴⁵⁰ See *id.* at 195.

⁴⁵¹ In a subsequent study, in the context of antitrust criminal sanctions by district judges, Cohen added political party components to the promotion potential factor, and found that the promotion potential effect was more pronounced for Democrat judges than for Republican judges. See Cohen, *supra* note 209, at 16-27.

⁴⁵² See, e.g., *Bowsher v. Synar*, 478 U.S. 714 (1986) (ruling that executive function of determining how to implement budget reductions could not be conferred upon legislative branch officer); *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 951-59 (1983) (invalidating on separation of powers grounds "legislative veto," by committee or house of

thereby indicating that an entity with the power to issue substantive rules or regulations located outside of the executive branch would be on tenuous constitutional ground. Indeed, the invalidation of the Guidelines by 61% of the district court judges, most on separation of powers grounds, may in part reflect the influence of the Supreme Court's then-recent precedents invigorating separation of powers jurisprudence during this period.⁴⁵³

In June 1988, after about two-thirds of the district court rulings had already been rendered, the Supreme Court approved the judicial appointment of independent counsel to investigate and prosecute criminal wrongdoing by high officials in *Morrison v. Olson*.⁴⁵⁴ In retrospect, the Supreme Court was signaling a course correction in its separation of powers doctrine, which it later confirmed by upholding the Sentencing Commission in *Mistretta v. United States* on decidedly pragmatic and nonformalistic grounds.⁴⁵⁵ But the significance of *Morrison* was not fully appreciated at the time.⁴⁵⁶ In the first of the

Congress, that would overturn executive decision or rule without passage of legislation by both houses); see also Fried, *supra* note 82, at 133, 158 (describing early successes of Reagan Administration's separation of powers struggle in *Chadha* and *Bowsher*). For more on the formalist view of separation of powers, see *supra* note 87 and accompanying text.

⁴⁵³ For recent empirical research on the influence of Supreme Court precedent on lower federal court decisionmaking, see Charles A. Johnson, *Law, Politics, and Judicial Decision Making: Lower Federal Court Use of Supreme Court Decisions*, 21 *L. & Soc'y Rev.* 325, 338-39 (1987) (finding that lower courts pay attention to Supreme Court decisions in decisionmaking, especially when facts, issues, or litigants are generally similar between cases); Donald R. Songer, Jeffrey A. Segal & Charles M. Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 *Am. J. Pol. Sci.* 673, 690-94 (1994) (finding that courts of appeals were highly responsive to changing policy trends in Supreme Court on criminal search and seizure, although there was still room for pursuing their own policy preferences).

⁴⁵⁴ 487 U.S. 654, 685-97 (1988).

⁴⁵⁵ See *Mistretta v. United States*, 488 U.S. 361 (1989); see also Fried, *supra* note 82, at 170 (describing *Mistretta* as "another nail in the coffin of a rigorous view of the separation of powers"); *id.* at 161-71 (discussing reasoning of *Mistretta* decision).

⁴⁵⁶ Prior to the confirmation of the Supreme Court's departure from a formalist approach to separation of powers in *Mistretta*, leading scholarly experts expressed doubt and uncertainty about whether the *Morrison* decision evidenced a significant shift in the direction of separation of powers jurisprudence. See, e.g., Stephen L. Carter, *The Independent Counsel Mess*, 102 *Harv. L. Rev.* 105, 105-07 (1988) (acknowledging that "the method that the majority employed in *Morrison* is markedly different from the one that the Justices have recently used to decide separation of powers cases" but suggesting that, "far from signalling a change in direction," *Morrison* "might herald the Supreme Court's resolution to stay the course" in sustaining legitimacy of independent federal agencies); Krent, *supra* note 87, at 1310-22 (suggesting that inconsistency of *Morrison*'s approval of federal prosecutor independent of executive control with structural approach to separation of powers was "more apparent than real" given power of Congress to specify means that executive must employ to enforce criminal laws, and adhering to position that Sentencing Commission's formulation of sentencing policy exceeded constitutional powers of judiciary and

two court of appeals decisions on the Guidelines, the court invalidated the Guidelines notwithstanding the intervening Supreme Court opinion in *Morrison*.⁴⁵⁷ Moreover, the district courts continued to reject the Guidelines by nearly an identical margin after that decision.⁴⁵⁸ For our study, we created a dummy variable for district court decisions postdating *Morrison* and found no significant variation.

On August 23, 1988, the United States Court of Appeals for the Ninth Circuit struck down the Guidelines as unconstitutional on separation of powers grounds.⁴⁵⁹ Accordingly, for the next three months, there was a single circuit court precedent directly on point and it cut hard against the Guidelines' validity. During this period, district judges in other circuits (no district judges in the Ninth Circuit issued subsequent rulings since the appellate opinion was binding authority) invalidated the Guidelines by a margin of 16 (73%) to 6 (27%), as compared to the overall 61% to 39% margin for reversal of the Guidelines. However, when we controlled for other variables by adding a dummy variable for post-Ninth Circuit decisions, we found no significant variation, perhaps due to the small number of decisions in this category. On November 14, 1988, the United States Court of Appeals for the Third Circuit sustained the Guidelines against constitutional challenge.⁴⁶⁰ Accordingly, for the very few district court decisions issued after that late date, circuit court precedent was evenly divided and thus without direction.

constituted "a glaring departure from the case or controversy limitation on judicial action"). But see Theodore Y. Blumoff, *Illusions of Constitutional Decisionmaking: Politics and the Tenure Powers in the Court*, 73 Iowa L. Rev. 1079, 1082-83 (1988) (stating that *Morrison* demonstrated "a new willingness to reappraise [the Court's] separation of powers decisions" and arguing that stricter separation of powers rule "undermines the political branches' ability to fashion creative solutions to evolving problems").

⁴⁵⁷ See *Gubiensio-Ortiz v. Kanahele*, 857 F.2d 1245 (9th Cir. 1988), vacated sub nom. *United States v. Chavez-Sanchez*, 488 U.S. 1036 (1989).

⁴⁵⁸ The proportion of district court rulings on the Sentencing Guidelines was remarkably consistent across time, with 128 (60.4%) judges invalidating the Guidelines and 84 (39.6%) upholding the Guidelines prior to the *Morrison* decision in late June 1988, and with 51 (62.2%) striking the Guidelines and 31 (37.8%) approving the Guidelines after *Morrison*. In his earlier study, Cohen used only those Sentencing Guidelines decisions that were rendered between January and July of 1988. See Cohen, *supra* note 21, at 190. He suggests that termination of his study at that interim point was justified by the intervention of the Supreme Court's *Morrison* decision. See *id.* at 184 & n.4. Thus, he apparently believed that the precedential effect of *Morrison*, presumably suggesting the Court was amenable to a judicial branch Sentencing Commission, would control subsequent district court rulings. In retrospect, Cohen was correct that *Morrison* presaged the *Mistretta* decision, but was mistaken in believing that *Morrison* would influence district court rulings.

⁴⁵⁹ See *Gubiensio-Ortiz*, 857 F.2d at 1266.

⁴⁶⁰ See *United States v. Frank*, 864 F.2d 992 (3d Cir. 1988), cert. denied, 490 U.S. 1095 (1989).

From the day after the very first district court decision at the beginning of the Sentencing Guidelines Crisis, there was of course precedent in the form of decisions by other district judges. District court judges are not obliged to follow decisions rendered by other district judges, even within the same district. Nevertheless, Richard Posner suggests "there is . . . more genuine adherence to precedent than cynics will admit, even to precedent that is not binding because it is not the precedent of the same or a higher court."⁴⁶¹ Based upon our study, that tendency appears to be at work in these Sentencing Guidelines decisions.

The variable PREC-CIR, which measures the relative weight of prior positive and negative district court rulings within a particular circuit at the time of each judge's ruling, was significant at the 95% probability level. The variable was coded so that the sign was positive when the weight of decisions supported the validity of the Guidelines and was negative when the weight of decisions went against the Guidelines. Thus, the significant positive finding reflects that district judges were indeed inclined to follow the weight of precedent within their circuit. Moreover, this precedent variable was consistently significant on both the standard set of independent variables and the alternative analysis on the outcome dependent variable.⁴⁶²

In his study, Cohen also developed ratio variables for precedents (apparently simple ratios) of prior decisions upholding and rejecting the Guidelines at the district, circuit, and national levels.⁴⁶³ However, none of Cohen's precedent variables was significant.⁴⁶⁴ Whether because of the larger universe of decisions, the independent set of variables, or the different formula to measure precedent in our study, the positive finding for persuasive precedent in our study contrasts with Cohen's. Cohen did find that the presence of one or more prior unconstitutional decisions in the same district was related to a negative constitutional decision.⁴⁶⁵ Cohen conjectured that the politically safe, if personally undesirable, decision was to uphold the Sentencing Commission, but "[o]nce one of their colleagues [took] the initiative to

⁴⁶¹ Posner, *Federal Courts*, *supra* note 155, at 373.

⁴⁶² See *supra* Table 4. Because the PREC-CIR variable measured precedent only in terms of general outcome, that is, by whether decisions held the Guidelines constitutional or unconstitutional, we could apply it only on the general outcome dependent variable. In a future study, we plan to explore precedential influence at the constitutional theory/reasoning level, creating additional precedent variables based on the written opinions.

⁴⁶³ See Cohen, *supra* note 21, at 194-96.

⁴⁶⁴ See *id.*

⁴⁶⁵ See *id.* at 195-96.

vote [his] true feelings on this issue . . . it [was] easier for others to follow."⁴⁶⁶

Returning to our findings, judges appear to find the written opinions of other judges valuable as persuasive precedent when they confront difficult issues and there is no binding higher authority. Cynically,⁴⁶⁷ or realistically, one might regard reliance upon decisions by other judges as simply following the crowd, that judges find utility in going with the flow and avoiding unfavorable attention by breaking ranks.⁴⁶⁸ In an economic analysis of precedent, William Landes and Richard Posner theorize that judges are likely to follow the precedents laid down by other judges because the refusal to do so would weaken the practice of decision by precedent and thus undermine the precedential value of their own decisions in the future.⁴⁶⁹ However, this rational choice theory applies more directly in the context of *stare decisis* and has less force for following persuasive authority.

Alternatively, and more idealistically perhaps, the legal model expects judges to follow precedent, both mandatory and persuasive, so as to promote "legal stability and continuity."⁴⁷⁰ One of the "main defenses against judicial lawmaking" is the "control of precedent,"⁴⁷¹ which is strongest when it is binding authority from higher tribunals or *stare decisis* in the form of prior decisions by the same court directly on point. However, giving substantial weight to persuasive precedent by sister tribunals in other districts or circuits also constrains the exercise of discretion and ensures greater consistency across geographic lines.

Of course, these two theories are not inconsistent. The public choice hypothesis that judges seek utility in the forms of popularity with their colleagues and enhanced reputation with the legal profession at large⁴⁷² and the legal model's expectation that judges attend to

⁴⁶⁶ *Id.* at 196.

⁴⁶⁷ See Edward L. Rubin, *Public Choice and Legal Scholarship*, 46 *J. Legal Educ.* 490, 490 (1996) (describing public choice theory as "pessimistic model of human behavior").

⁴⁶⁸ See Cohen, *supra* note 21, at 190 (expecting that district court decisions on Sentencing Guidelines would reflect "an overall trend toward an unconstitutional ruling (as a result of the decrease in discretion) as well as toward a 'follow the leader' mentality as a result of the concern for peer recognition").

⁴⁶⁹ See William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 *J.L. & Econ.* 249, 272-73 (1976) (discussing different motivations judges might have for following precedents); see also Posner, *What Do Judges Maximize*, *supra* note 52, at 18 ("[B]y refusing to follow their predecessors' decisions and thus weakening the practice of decision according to precedent, they reduce the likelihood that their successors will follow their decisions.").

⁴⁷⁰ Glick, *supra* note 26, at 295.

⁴⁷¹ Howard, *supra* note 30, at xxiii.

⁴⁷² See Posner, *What Do Judges Maximize*, *supra* note 52, at 15.

persuasive precedent and preserve legal stability may converge.⁴⁷³ Utility maximization and the interests of the legal system may reinforce one another in this context. In any event, however theorized, precedent is plainly a *legal* element. In the past, “[e]xplanations of judicial decision making [have tended] to emphasize personal and environmental factors while downplaying legal factors.”⁴⁷⁴ While our study has certainly indicated the influence of a variety of extra-legal factors, the study also confirms the explanatory role of one of the main components of traditional legal theory—precedent.

VI CONCLUSION

For adherents to the legal model of judging—impartiality, objectivity, suppression of personal experiences and attitudes, and exclusive attention to legal doctrine and rules—this study may be a sobering splash in the face with cold reality. For students of the behavioral school, the plethora of variables that were found influential at one level or another offers some encouragement—there is still life in that aging vessel. Indeed, the opportunity for greater depth of study by exploring judicial reasoning in opinions rendered in an identical case scenario may have allowed demographic and experiential influences previously submerged in aggregate vote outcomes to fully emerge. For public choice theorists, the study provides confirmation that judges act in a utility-maximizing manner. Both the impact of caseload upon job satisfaction and the opportunity for career advancement through elevation in the judiciary appear to influence adjudication.

Yet, as is often the case with empirical research, our study provides both comfort and challenges to all camps, again reminding us that judicial behavior is too complex for easy conclusions about influences and patterns. With respect to the legal method model, neither this study, nor any other, can undermine its persistent normative appeal. Despite “the fact that the real world makes classical judging an aspiration but not always a reality, that model should remain a goal.”⁴⁷⁵ Indeed, greater awareness of the powerful influences of per-

⁴⁷³ Cf. Landes & Posner, *supra* note 469, at 292 (stating, in context of proposed economic model for judicial adherence to precedent, that “[t]he concept of precedent is at the heart of the way in which lawyers think about the legal system”).

⁴⁷⁴ Johnson, *supra* note 453, at 338.

⁴⁷⁵ Solimine & Wheatley, *supra* note 269, at 910. See Kent Greenawalt, *Private Consciences and Public Reasons* 142 (1995):

[T]he traditional model posits as a desirable aspiration an ideal that legal decision not depend on the personality of the judge. The aspiration is not fully

sonal background and attitudes may be necessary to encourage greater self-conscious impartiality and objectivity among judges and perhaps to inform the rest of us of the need to better constrain judicial discretion with law.⁴⁷⁶ And in one vital particular—the attention of judges to precedent, even when not obliged to do so—our study demonstrates that legal factors remain vital in the process of judging.

Likewise, the behavioral model is simultaneously bolstered and buffeted. While the greater than expected influence of several background variables is consistent with the behavioral hypothesis, the influence of other environmental and legal factors reveals the inadequacy of behavioralism as a fully explanatory model. The implications of the study for the public choice model remain somewhat uncertain, given that the direction of influence of criminal caseload was not easily explained. Moreover, future studies will have to be increasingly sophisticated in exploring the utility-maximizing behavior of judges. As would be anticipated with a model based upon rational choice, the strong influence of promotion potential at the general outcome level proved dependent upon evolving circumstances.

Finally, and perhaps as further consolation for legal theorists, we offer a qualitative impression based upon our review of the opinions in the study. Richard Posner mentions that judges may also find utility through the “intrinsic pleasure” of writing and exercising analytical prowess.⁴⁷⁷ In reading the many Sentencing Guidelines decisions, it was impossible not to be captivated by the excitement, the devotion to legal analysis, the depth and rigor of constitutional analysis, and, yes, the true pleasure revealed by the judges in their engagement with a meaningful legal problem. As we conducted this phase of the study, it was difficult at times to escape the feeling that we were languishing at the side show and missing the main event in the center ring. Our coding of reasoning categories and theoretical themes cannot fully convey the richness of the legal debate in which the judges were engaged, and into which they sought to draw the readers of their opinions.

achievable even if all judges are intelligent, well-trained, and conscientious, but it is worth striving for by emphasizing that bases of legal judgment should be open and available to all.

Id.; see also Mary Ann Glendon, *A Nation Under Lawyers* 128 (1994) (stating that classical judges were “openly resigned to the fact that total objectivity is an unattainable goal,” but nonetheless insisted upon striving for impartiality and restraining their biases).

⁴⁷⁶ See Cross, *supra* note 48, at 326 (considering “the law to be ropes binding a judicial Houdini,” consideration of empirical research may help us “understand which brand of rope and which type of knot are the most effective and inescapable”).

⁴⁷⁷ Posner, *What Do Judges Maximize*, *supra* note 52, at 19.

Legal concepts, lines of precedent, and doctrinal themes may not be sufficient for understanding judicial decisionmaking,⁴⁷⁸ but they are surely essential. Legal analysis, as a distinct method of human reasoning, cannot be reduced to any methodology borrowed from another discipline.⁴⁷⁹ The judge brings to bear “not only a range of personal and political preferences, but also a specialized cultural competence—his knowledge of and experience in ‘the law.’”⁴⁸⁰ Backgrounds will vary, attitudes will differ, environments will change, but the law remains the alpha and omega of judicial decisionmaking.

⁴⁷⁸ See Joel Levin, *How Judges Reason* ix (1992) (arguing that “getting legal concepts and lines of precedent straight and in good order is not enough” in judging, because pluralist and democratic views of justice and fairness also count).

⁴⁷⁹ See Richard H. Fallon, *Non-Legal Theory in Judicial Decisionmaking*, 17 *Harv. J.L. & Pub. Pol'y* 87, 88 (1994) (“American law cannot be reduced to any other discipline, nor can legal analysis be reduced to any other methodology.”); Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 *Tex. L. Rev.* 35, 57 (1981) (arguing that legal reasoning is “distinct method” of “analogy and precedent” that involves “the application of a trained, disciplined intuition where the manifold of particulars is too extensive to allow our minds to work on it deductively”).

⁴⁸⁰ Posner, *What Do Judges Maximize*, *supra* note 52, at 24-25.